

# STATE AND SOVEREIGNTY IN MODERN GERMANY

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NEW HAVEN • YALE UNIVERSITY PRESS

LONDON • HUMPHREY MILFORD • OXFORD UNIVERSITY PRESS



**TO**  
**MY BROTHER**  
**1894-1918**





## PREFACE

**T**HE half-century from 1871 to 1921 with which this study is chiefly concerned was one of unparalleled activity in Germany, and, even though that activity was primarily in other fields than the intellectual, still much was being written and thought which is worthy of greater recognition than it has yet received. There can be no doubt that the classic period of German thought around the beginning of the last century was vastly more significant than the era here dealt with, but this period has been exhaustively examined and discussed both within Germany and without. The fifty years more particularly under review here can indeed boast no names which might rank with those of Kant, Fichte, Schelling, and Hegel, to name only the greatest; but it is impossible to ignore the work of the thinkers who succeeded them.

These five decades marked extraordinary changes in Germany; and these changes were clearly reflected in German political thought. To speak only of the political aspects, they begin with the founding of the Empire, which meant the achievement of German unity and the vindication of the monarchical principle as against the democratic tendencies of 1848, and end with the Revolution, which rebuilt Germany on the most thoroughgoing democratic foundation and advanced a stage further the federalism which Bismarck had bought with blood and iron.

One name would perhaps sum up all that is popularly known of this period, that of Heinrich von Treitschke, acquaintance with which was due rather to the war than to the intrinsic merit of his thought. To the war likewise is due the popular knowledge of General von Bernhardi and other apostles of war. In more technical circles, Otto von Gierke has come to a large measure of recognition, but, if one may judge from the fact that only a small fragment of his work has found its way into translation, even here it is probable that

there is slight acquaintance with his original research and speculation. Maitland's brilliant introduction to a not particularly significant excerpt from Gierke's chief work is undoubtedly the principal source of knowledge of Gierke in English-speaking countries. The writings of Rudolf von Ihering, Georg Jellinek, Josef Kohler, and Rudolf Stammler are also to some extent known. With these few exceptions, however, it may be said that the work of the juristic and political thinkers in Germany since the founding of the Reich (and, indeed, since Hegel) has been largely neglected. In part to be sure the blame for this must fall upon the German writers themselves since their thought has on the whole been curiously unrelated in form, temper, and substance to that of their foreign contemporaries.

The present study is an attempt to give some indication of the lines along which that thought has been proceeding.

In Germany the sphere of the jurist is far wider and his importance considerably greater than in any of the Anglo-Saxon countries. The jurist in high place must be at once philosopher and political theorist, as well as student of law and laws. Traditionally the relation between law and political thought in Germany is very intimate, the reason being perhaps that dangerous political doctrines were less suspect in the guise of jurisprudence than under their own proper name. Althusius, Pufendorf, Stahl, Ihering, Stammler, Kohler, were all jurists, and even the philosophers such as Kant and Hegel tended to embody their political philosophy in the form of treatises on law or right. In the nineteenth century this tradition was strengthened by the introduction of the *Gesellschaftswissenschaft* as a discipline distinct from that of the *Rechts-* and *Staatswissenschaften*. Hegel himself opened the doors to this distinction, and the separation was carried further by Karl Marx and Lorenz von Stein. With the development of sociology, which gained a foothold in Germany rather later than elsewhere, the breach was complete. The formal and normative aspects of political thought were severed from the social and economic. In effect the spheres of jurisprudence and political thought were more

sharply defined to the formal exclusion of extra-normative considerations. The elements which might have assisted in the development of a body of political thought distinct from jurisprudence were relegated to other spheres.

In consequence, if one would seek works on *allgemeine Staatslehre* in Germany one must look primarily to the jurists. Naturally the *Staatslehre* thus takes on a juristic tone which makes it almost indistinguishable from the *Staatsrechtslehre*. Georg Jellinek's *Allgemeine Staatslehre*, for example, the outstanding work of this order in the period under discussion, is obviously the work of a jurist dealing essentially from the juristic standpoint with political problems. The concepts, forms, and varieties of political organization—and especially in the upper ranges where sovereignty appears—are regarded as belonging to the province of the jurist far more than to anyone else. •

The one important work in political theory proper, as distinguished from jurisprudence on one hand and social and economic theory on the other, in this period is the *Politik* of Treitschke. But even here there is little that is not of more interest and significance from a purely historical or antiquarian standpoint than as part of the equipment of the modern political thinker. Treitschke was, if one may be allowed the ever dangerous and facile generalization, the unphilosophic and dogmatic expression of one phase of the Hegelian thought, and at once the intellectual counterpart to, if not the mouthpiece for, the Bismarckian action. Whatever his fame as a historian, as a teacher, as a political counsellor in trying times, it is difficult to see why his political thought, taken by itself, should entitle him to a place in history.

The State was for Treitschke the beginning and end of all things: States in his view were the individuals of history, and no lesser entity might claim to defend its rights before the needs of the State. Ernest Barker has said of the *Politik*: "Its central tenet and cardinal principle may be summarized in four words: 'The State is power.' And if we should attempt to descry in advance the bearing of these words, it may be seen in another pithy phrase: 'War is politics *par*

*excellence.*' " When Treitschke lays it down that "it is of the essence of the State that it should be able to enforce its will by physical force," the words are to be taken quite literally as giving the heart of his doctrine. Sovereignty is the mark of the supreme majesty of the State, of its inalienable and unique self-completeness, and of its command over the army. Power, he wrote, is the principle of the State as faith is of the church; and the small powerless State is a self-contradictory absurdity.

It is surely not in views of this sort that a theory of State and sovereignty fitted to the modern world is to be sought, yet such was the reigning political theory, as apart from jurisprudence, in Germany up to the end of the World War. Opposed to this order of theory was the whole body of Socialist speculation, but this, springing directly from Marx, was little concerned with the State and political organization in general. As Marx had been content to damn the existing State, to predict its "dying off," and to leave the future to itself, so the German Socialist theorists on the whole turned their full attention to the reordering of economic and social affairs without troubling greatly about the future of the State. The problem of sovereignty in particular was one which the whole tenor of their thought allowed them easily to escape.

There is little need to comment upon the difficulty—and, occasionally, the impossibility—of translating the German juristic and philosophic terminology into English at once intelligible and adequate. To anyone acquainted with German jurisprudence it will be obvious that much of the flavor, if not the sense as well, of the original is inevitably lost in translation. Even where the words have a literal equivalent in English, they must often lose a significant shade of meaning when translated. In the present work the awkwardness of many of the renderings from the German is only to be justified on the grounds that in that way it seemed possible to secure a closer adherence to the sense of the original. Where no technical questions are under discussion, the translations have been considerably freer. Usually where the English

rendering is only an approximate equivalent, the German term has been placed after it in brackets. A discussion of the usage of certain terms will be found in the footnotes.

The substance of the present work in somewhat different form was submitted in the University of London for the degree of Doctor of Philosophy.

I should like to express here my indebtedness to Dr. C. J. Friedrich, of Harvard University, who offered a number of valuable suggestions and criticisms, and my deep gratitude to Professor H. J. Laski, of the London School of Economics and Political Science, both for his unfailing readiness to act as guide through the mazes of German jurisprudence and for the privilege of working with him.

R. E.

*Cambridge, Massachusetts*  
*June, 1928.*

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# CONTENTS

CHAPTER	PAGE
I. HISTORICAL INTRODUCTION	1
II. THE GERMAN EMPIRE AND ITS JURISTS	47
III. FEDERALISM	92
IV. THE SCHOOL OF THE GENOSSENSCHAFT.	126
V. THE PHILOSOPHICAL JURISTS	155
I. THE NEO-KANTIAN	159
II. THE NEO-HEGELIAN	186
III. OTHER PHILOSOPHICAL THEORIES	200
VI. THE NATIONAL ASSEMBLY AND THE WEIMAR CONSTITUTION	209
I. THE REVOLUTION AND THE STATE	211
II. THE NEW FEDERALISM	236
VII. CONCLUSION—STATE AND SOVEREIGNTY	254
INDEX	275





# STATE AND SOVEREIGNTY IN MODERN GERMANY

## CHAPTER I HISTORICAL INTRODUCTION

**T**HE attempt to set a precise date to mark the beginning, in a political sense, of modern Germany is quite as futile as the effort to lay down exact temporal boundaries for any great historical era or movement. The modern world has its roots too deeply in the past to make possible any radical separation of one period from another. Any date that one may set must, from the very nature of the historical process, be in greater or less degree arbitrary.

In the case of Germany there are, to be sure, great outstanding political events each of which, at first sight, gives the appearance of being a radical breach with the past, but the further each is analyzed the less does it lend itself to any clear-cut separation from all those that preceded it. On the narrowest interpretation "modern" Germany might be said to date from the Revolution of 1918, but, to look only at the political aspects of the situation, the present Constitution can scarcely be understood without reference to the Imperial Constitution laid down in 1871. The change from the monarchical to the republican principle is the most significant of the transformations that took place in 1918-1919, but this change had been amply foreshadowed by the past. Certainly the particularist feeling was little weakened by the War and the Revolution, even though from a formal standpoint the power of the central government was much increased by the Weimar Constitution.

Nor does 1871 itself offer a more satisfactory starting point. The federal unity achieved by Bismarck then was the result of a struggle which had been carried on for considerably over half a century—a struggle which was itself in large part one of the many and curious fruits of the hardying Holy Roman Empire. The ghost of the Empire lin-

gered on to plague any who attempted to build anew, as the settlements in Vienna at the close of the Napoleonic Wars indicated clearly enough.

If one must pick an arbitrary date for the birth of modern Germany probably none has better claims than the opening of the reign of Frederick the Great. With Frederick was born the force which was to take the principal part in the disruption of the old system and the construction of the new. That is not to say that Frederick did not build on the foundations which had been laid for him by the Great Elector and his successors or that Prussia under his rule could have attained the same greatness without those foundations, but merely that in the use which Frederick made of his power and the view that he took of it, he pointed the way to the future more clearly than did his predecessors. Prussia became the center and the driving force of the new Empire, and it was, in a sense, Frederick the Great who created the Prussia of modern times.

There would be none to dispute Frederick's claim to greatness in the field of political action, and it would be justifiable on that score alone to take his reign as a starting point for a survey of modern German political thought. But it is almost an axiom of German political thought that Frederick was not only the first exponent in Germany of modern political principles but that he also contributed profoundly to the development of political philosophy. And contemporaneous with him—although his chief political works were written after Frederick's death—was Kant, whose somewhat hesitating political theories so clearly mark the transition from the old to the new.

Frederick the Great, wrote Bluntschli, "is in truth not only the founder of a new State, but the first and most distinguished representative of the modern idea of the State";<sup>1</sup> a view in defense of which much can be said. In his celebrated claim to be the first servant of the State—in marked con-

<sup>1</sup> J. K. Bluntschli, *Geschichte der neueren Staatswissenschaft*, 1881, p. 261; Otto von Gierke, *Johannes Althusius*, 3d ed., 1913, p. 358; O. Bähr, *Der Rechtsstaat*, 1864, p. 47; Ernst Krieck, *Die deutsche Staatsidee*, 1917, pp. 61 f.; Kurt Wolzendorff, *Vom deutschen Staat und seinem Recht*, 1917, pp. 34 ff.

trast to Louis' "L'État c'est moi"—is seen the essence of the distinction, to which Hegel later gave philosophic form, between the State on one hand and the monarch, the people, or a sum of the two on the other. The old principle of absolutism by divine right is shattered by Frederick. Absolutism indeed remains, but it is an absolutism always tempered by the duties which are imposed on the king by the needs of the State whose servant he is. In a word, absolutism in Frederick's hands becomes benevolent despotism. The sovereign is not yet limited by a constitution or checked by other organs of the State<sup>2</sup> but the moral obligation upon him is held to constitute a check no whit less formidable than any possible external obligation. Justice must be the main object of the prince, and the welfare of his people must be preferred to any personal inclination. At the time of his accession to the throne Frederick announced to his ministers that it was his will that if his particular interest and the general good of his country should ever seem to run counter to each other, then the latter should always be preferred. But it must be noted that it is in the last analysis the business of the prince himself to decide what constitutes the good of his country. *Raison d'état* becomes a justification for all things, and it is at the same time the only justification that the prince can plead. The will of the king, in Frederick's doctrines, is law, but it must be a will directed to the good of the State. As Lévy-Bruhl puts it, the king "is not responsible to anyone, and he must consider himself as responsible to all."<sup>3</sup>

Whatever may be the moral judgment concerning Frederick's actions in foreign affairs, there can be little question that in his relations with his subjects he fulfilled scrupulously the demands which his theories and his State made upon him, as the famous case of the miller of Sans Souci bears witness. It must pass unquestioned that he was deeply and actively conscious of a greater whole, a tradition, an

<sup>2</sup> In his *Anti-Machiavel*, however, Frederick points to the government of England as a model of wisdom, since there the Parliament is arbitrator between king and people, and the king has power to do as much good as he pleases, but not evil; commentary on chap. XIX of *The Prince*.

<sup>3</sup> L. Lévy-Bruhl, *L'Allemagne depuis Leibniz*, 1890, p. 95.

idea, of which he felt himself in fact only the servant. He spoke of himself often as being in a position similar to that of the father of a family: the power was his, but it must be exercised in such a way as always to maintain the tradition of the family and to further its present and future good. The relation of Frederick to his State has been well put by Erich Marcks: "he lifted up his eyes to his State and subjected himself wholly to it, he was this State and felt himself to be so, and still felt himself to be its servant. . . . There is no more stirring interpenetration of ambition and duty, of possession and possessor, of stark subjectivism and unconditional devotion."<sup>4</sup>

But the practical application of this principle of benevolent despotism hung ultimately entirely upon the character of the despot. It required the personal genius of a Frederick the Great to ensure that his unlimited powers should not be turned to other ends than those dictated by unflinching devotion to the State. Nearly another century of growth was necessary for Prussia before the principle of limited constitutional monarchy could take institutional form to guarantee that in fact the will of the king should not have as content merely arbitrary personal desire.

When Frederick's successor, the weak Frederick William II, came to the throne in 1786, many of the age-old cobwebs had been torn away, a new life was stirring in German veins, and the romantic enthusiasm of the *Sturm und Drang* was already settling down into more stable channels.

## REASON AND REVOLUTION

With the appearance of Kant the tide of German thought began to set away from the doctrines of absolutism to which the Cameralists with Justi as their chief spokesman in the eighteenth century had given literary expression and which Frederick had so gloriously embodied. Kant was indeed not the first to suggest the virtues of constitutionalism—others

<sup>4</sup> "Die Nachwirkung Friedrichs des Grossen" in *Die neue Rundschau*, 23 Bd., 1912, p. 171; Friedrich Meinecke, *Die Idee der Staatsräson*, 1924, 5tes. Kap., gives an interesting picture of Frederick "als Diener der Staatsräson."

before him had pointed out the dangers of despotism and indicated means of curbing it<sup>5</sup>—but the authority of his great name and the time at which he wrote combined to give weight to his theories.

It must be conceded at the outset, however, that it is impossible to claim for Kant the same fundamental importance in political theory as in other fields of human thought. All that the master touched was transformed, but the transformation is far more hesitating and less complete in political thought than elsewhere. It is essential to an understanding of his political philosophy to remember that his chief work in this field—*The Metaphysical Elements of Law*—was first published in 1797, midway between Revolution and Restoration. Deeply affected by the teachings of Rousseau and by the practical application of those teachings across the Rhine, Kant was also conscious of the stirrings of a new school of thought which was to orient itself in a direction fundamentally different from that of the eighteenth century. In which of these directions he was to go, Kant never appeared quite certain: it might be said that he was at once a disciple of Rousseau and a prophet of the reaction. "Kant, the last and, in the realm of pure thought, most significant of the revolutionaries, is in practice already a counter-revolutionary."<sup>6</sup>

In consequence the theory of sovereignty is for him twofold—a duality which, with Bluntschli, we must confess neither logically nor morally defensible.<sup>7</sup> Kant clung rigidly to Montesquieu's doctrine of the threefold separation of powers, and insisted upon the subordination of the judicial and executive powers to the legislative. The latter, which he explicitly stated to be the *Herrschergewalt* or sovereign power, according to him, "can only fall to the united will of the people." The argument on which this is based is, that

<sup>5</sup> For a brief discussion, see G. P. Gooch, *Germany and the French Revolution*, 1920, pp. 22 ff.

<sup>6</sup> Adolf Dock, *Revolution und Restauration über die Souveränität*, 1900, p. 67.; C. E. Vaughan, *Studies in the History of Political Philosophy*, II, 1925, in his chapter on Kant ably shows the "oscillation" and self-contradictoriness of Kant's ideas. See especially, pp. 80 ff.

<sup>7</sup> "This combination of a doctrinaire popular sovereignty with a practical self-prostration before despotism appears to us neither logical nor moral," Bluntschli, *op. cit.*, p. 386.

since all law (*Recht*) proceeds from the legislative power, it must be impossible for the latter to be unjust. Injustice may arise where one person makes laws for another, but there can be none when a person makes his own laws for himself ("since *volenti non fit iniuria*"). "Hence," he concluded, "only the concurring and united will of all, in so far as each decides for all and all decide for each exactly the same thing—consequently only the general united popular will—can be legislative." Furthermore, since only a legislative power thus constituted can be just, the citizens of the State cannot be obliged to obey another law than that to which they have given their consent.<sup>8</sup> The Kantian ideal is the republic in which law rules by itself, securing the obedience of the rational individuals who have unanimously formulated it because of their recognition that it is the embodiment of Reason.<sup>9</sup>

All of this, it will be seen, is very closely related to the thought of Rousseau; in fact, it is difficult to say exactly where Kant departs in principle from Rousseau because of the confusion of tendencies in the former's political philosophy. As far as the social contract is concerned, Kant's acceptance of it as a regulative idea is certainly far more hypothetical and tentative than his predecessor's. More important is it that Kant tends to supersede the "naïve" view of the empirical will of the conscious individual, postulating in its place a "real will" which is at once universal and the inevitable expression of the rationality of the individual. Certainly the principle of sovereignty is as rigidly stated by Kant as by Rousseau.<sup>10</sup>

In the preference for the republic constituted according to the laws of freedom there speaks the secluded philosopher of Königsberg. But in direct opposition to him rises the

<sup>8</sup> Cf. *Metaphysische Anfangsgründe der Rechtslehre*, §46.

<sup>9</sup> *Op. cit.*, §52.

<sup>10</sup> "Der Herrscher im Staat hat gegen den Untertan lauter Rechte und keine (Zwangs-) Pflichten. . . . Ja, es kann auch selbst in der Konstitution kein Artikel enthalten sein, der es einer Gewalt im Staat möglich machte, sich im Fall der Übertretung der Konstitutionalgesetze durch den obersten Befehlshaber ihm zu widersetzen, mithin ihn einzuschränken," Allgemeine Anmerkung A to the *Staatsrecht*, *op. cit.*

good German monarchist, horror-struck at the thought that his comfortable little world, wrapped in tradition, might come tumbling down upon his head in Gallic fashion. The united rational will of all should indeed be sovereign, but if it is not—then it is not, and little more can be done about it. In the civil State what is right is what is law; the sovereign is the source of law; therefore, *ex hypothesi*, the sovereign is right. And it follows that revolt against the sovereign is wrong: even to question the legitimacy of his title and authority is to risk civil damnation. The doctrine that all authority is instituted by God is accepted by Kant not as a historical fact, but as a “principle of practical reason,” which expresses the truth that one should obey the existing legislative power, be its origin what it may. To attack the sovereign who is the author of all law is to cut oneself off from law absolutely; yet if a revolution proves successful, then the newly arisen sovereign is as absolute, as right, and as potentially eternal as his unfortunate predecessor.<sup>11</sup>

No discussion of Kant's political thought can, however, do him justice if it limits itself to his formal statement of the philosophy of law and the State. Probably it is not here but in his conception of eternal peace that Kant is most significant for the present. We have moved on beyond the day of the social contract; constitutionalism and limited monarchy are accomplished facts; but we seem nearly as far removed from a realization of Kant's dream of Eternal Peace as was the age in which he lived. Yet Kant sees it as a condition which must come: man in his continuous advance toward the good life must of necessity find some means to put an end to war. Just as the reign of universal violence forced men to band together under the coercive force of law in civil society, he suggests, so continual wars will drive States either into a cosmopolitan constitution, or, if a world State be held to threaten freedom with a world despotism, into a federation under an agreed international law.<sup>12</sup>

<sup>11</sup> Cf. Allgemeine Anmerkung A to the *Staatsrecht*.

<sup>12</sup> Cf. *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis*, 1793, Part III; *Zum ewigen Frieden*, 1795, Zweiter Definitivartikel; *Rechtslehre*, §61.

If one great and enlightened nation should constitute itself as a republic, Kant thought, then, since "by its nature it must be inclined toward eternal peace," a nucleus might be given about which the world federation could be built. He clearly recognized the inner contradiction of the principle of sovereignty in international law: the rule of law in any strict sense applies only within the State; as between States there is a condition of anarchy. And if they would pass beyond the anarchy of the state of nature, Kant insisted, States, like individuals, must give up their "natural" sovereign independence to gain the rational and secure freedom which is only to be found under the universal reign of law.

If Kant was self-contradictory, Fichte was perhaps even more so, but where the former combined his contradictions in a single volume, the latter carried the doctrines of each of his several works through with a relentless logic only to begin almost wholly afresh in his next. It would be difficult to find any other single writer who more clearly reflected the changes which were taking place during his lifetime. "Each of his political treatises," writes C. E. Vaughan, "corresponds, more or less closely, to one of the turning points in the great European struggle of his day."<sup>13</sup> In his earlier period,<sup>14</sup> he was dominated by the conception of the sovereign ego which limits itself in order to leave freedom for other similar sovereigns. The State for him was no more than an abstract idea: reality attached to its several citizens, but not to the State itself. Law he held to be the condition laid down by reason for the association of these sovereign egos. He insisted that the purpose of all government was to make government unnecessary, and even went so far as to assert that any individuals who chose to set up a separate State within the original body were at full liberty to do so.

This ideal was left far behind by Fichte in his later development when he turned first to State Socialism, and finally, inspired by the fire of his own nationalism, to the

<sup>13</sup> *Op. cit.*, p. 95. Vaughan adds: "By its very groping and incompleteness the work of Fichte is a faithful record, the most full and accurate that has come down to us, of the mental struggles of his generation."

<sup>14</sup> Fichte's earlier period is best exemplified by his *Beiträge zur Berichtigung der Urtheile des Publicums über die französische Revolution*, 1793.



State as the bearer and champion of the highest spiritual and cultural goods of the nation.<sup>15</sup> In this latter phase he saw the State as both economically and spiritually a completely self-dependent unity, guaranteeing the right to work, overseeing the economic processes, and promoting the cultural life of its members.

It was far less, however, as a systematic political thinker that Fichte was important to Germany and her growth, than as an inspired national leader, spurring his countrymen into a united assault upon the alien armies that dominated their soil. In his epoch-making *Addresses to the German Nation*<sup>16</sup> he was content to leave the individual German States and principalities undisturbed in their sovereignty, but he demanded that they should be ruled by an ever present consciousness of the unique spiritual heritage which transcended their particular boundaries and bound them together into a single nation. He called for the hero, the *Zwingherr* who should build the German nation-State upon the basis of freedom and reason. For the first time in German history the emotional driving force of the idea of the nation was effectively linked to the conception of the State.<sup>17</sup>

The individualism which was the outstanding feature of the early thought of Fichte found another strong champion in Wilhelm von Humboldt. The title of von Humboldt's principal work—*Thoughts Concerning an Attempt to De-*

<sup>15</sup> In the *Grundlage des Naturrechts*, 1796-1797, the change that was coming over Fichte is already evident, while *Der geschlossene Handelsstaat*, 1800, carries it considerably further. His final period is represented by *Die Staatslehre oder über das Verhältnis des Urstaats zum Vernunftrecht* (lectures delivered in 1813, and first published in 1820). "Fichte in his book on the Revolution had pushed to the extreme the principle of the will and of individualism. . . . Later, on the contrary . . . he maintained in an excessive manner the Socialist doctrine of the omnipotence of the State," Janet, *Histoire de la science politique*, 3d ed., 1887, II, 633. Cf. Vaughan, *op. cit.*, p. 94.

<sup>16</sup> *Reden an die deutsche Nation*, 1808. "The German uprising against Napoleon was largely due to his influence," wrote Alfred Weber of Fichte; *History of Philosophy* (Tr. by Thilly), 1896, p. 482. Cf. Ernst Krieck, *Die deutsche Staatsidee*, 1917, pp. 103 ff., 23.

<sup>17</sup> For the development of the idea of the nation-State in Germany as opposed to the abstract rational universalistic State, see the first book of Friedrich Meinecke's admirable *Weltbürgertum und Nationalstaat*, 6th ed., 1922; for Fichte, see especially chap. VI.

*termine the Limits of the Activity of the State*,<sup>18</sup>—expresses the heart of his political position. The individualism of von Humboldt, like that which Mill and Spencer later developed in England,<sup>19</sup> assumed the virtually exclusive purpose of the State to be the protection of the individuals within its borders from external attack and internal disorder. The State in his view was merely a means to essentially individual ends, and if it performed its task of maintaining law and order, then it had no claim to encroach further upon individual freedom.

But the day of individualism was passing rapidly with the French nation, led by Napoleon, sweeping across Germany. If it had been possible up to that time virtually to ignore the State as an historical reality or to regard it as a "given" of no particular practical significance, it was no longer possible when, for lack of a State, the German nation had become the plaything of imperial Napoleon. Prussia under Frederick the Great had given Germany an indication of the possible significance of the State, but Frederick's successors were too weak to carry on the great tradition. All the energies of the Romantic revival—the attitude of Goethe may be taken as typical—were turned into other channels: "no ways were sought or found for turning to account the growing national self-consciousness which warmed itself at the literary hearth."<sup>20</sup> Not until she faced extinction at the hands of Napoleon did Germany wake to the real significance of State and nation.

The reaction which took place at this time was a double one: first, and for this study of only incidental importance, the successful assertion of the claims of German nationalism against the invader and his German clients, under the leadership of a Prussia renovated and inspired by Stein and others; and second, the revolt in political thought against

<sup>18</sup> *Ideen zu einem Versuch die Gränzen der Wirksamkeit des Staates zu bestimmen*, published in part in 1792, but not issued as a whole until 1851.

<sup>19</sup> G. P. Gooch has called the *Ideen* "the German equivalent to Mill on Liberty," "German Theories of the State" in *The Contemporary Review*, June, 1915, p. 743.

<sup>20</sup> Sir A. W. Ward, *Germany, 1815-1900*, I, p. 17. Cf. Krieck, *op. cit.*, p. 21.

the domination of Germany by theories alien to the German temper. The relation between these two phases of the reaction is obvious: the first is the driving-force which lends life and reality to the second, rescues political speculation from the university classroom and restores it to the arena of daily life. If German political practice sank back into the ancient ways under the influence of the Restoration, her political thought was given a momentum still far from exhausted.

Jurisprudence, political thought, and philosophy all contributed to the attack upon the individualistic rationalism which had formed the intellectual background of the French Revolution: together they constituted the intellectual justification of the Restoration and the era of the Restoration. For the development of the theory of sovereignty their two great contributions were, first, the conception of the State as a moral and organic person, itself the bearer of the sovereignty exercised by its organs, and later the distinction between State and society which led ultimately to the appearance of the separate, if indefinite, science of sociology.

### THE NEW PHILOSOPHY OF THE STATE

Kant marked the culmination of the old: "an epitaph rather than a prophecy"; but as Dante in his secularism contained in him the seeds of the new, Kant also in his theoretical conquest of the empirical individual by the rational individual and in his practical conservatism indicated that the Revolution had irretrievably engulfed the old. The work of prophecy was left for Hegel. The doctrines of the law of nature had set out from the assumption that the rational was the ideal which man might attain by conscious effort. At the threshold of the Hegelian system is written the doctrine that "that which is rational is real, and that which is real is rational."<sup>21</sup> The search for the rational or natural which should rightly take the place of the present existent irrational and unnatural is transformed into the effort to grasp the emergent rationality of that which is and has developed from that

<sup>21</sup> Hegel, *Philosophy of Right*, Dyde's translation, 1896, author's preface, p. xxvii.

which has been. Hence, the existing State is to be seen as something in itself rational—a rationality, it is perhaps superfluous to add, which it secures in its evolutionary progression through the self-negating moments of the Hegelian dialectic.

Apart from the dialectic itself, the Hegelian system contributed three other chief factors of inestimable importance to political and social thought. The first, and perhaps most important, of these—the definitive introduction of the historical method and of the idea of historical evolution and progress<sup>22</sup>—cannot be dealt with here at any length since it would lead far beyond the limits of the present survey. In general it may be said that the historical approach was the primary weapon of the post-Revolutionary thinkers in their attack upon the doctrines of natural law and rationalism which had preceded them. As Burke in England, so Hegel in Germany pointed to the unbroken chain which linked the present to the past and the future to both past and present, in refutation of the theory that a new and perfect order might be created by the process of taking thought.

Kant had remarked, if not in very positive fashion, that membership in a State was a necessary and natural condition for man, thus opening the way for a breach with any radical interpretation of the doctrine of the social contract. Hegel went far further in asserting the real, organic, independent personality of the State. Not only was the State not a contractual relationship between a number of individuals, but it was itself an Individuality, independent of and superior to all other individuals: a Person taking all other persons into itself and bringing to them that universality and fulness which otherwise they must lack.

Many previous thinkers, as Gierke has pointed out,<sup>23</sup> had come close to this conception, some had seemingly even had

<sup>22</sup> "The concept of evolution was already in the air. . . . But Hegel was the first writer to grasp the universal significance of what others had seized only in fragments. He was the first to interpret the whole range both of knowledge and action by the idea of development," Vaughan, *op. cit.*, II, 143.

<sup>23</sup> See Otto von Gierke, *Das deutsche Genossenschaftsrecht*, IV, 204-256; *Johannes Althusius*, 3d ed., 1913, pp. 123-210.

it in their grasp only to have it slip away from them again in the opposition between the "real" personality of the monarch and the unstable collective personality of the people. It remained for Hegel to give the theory definitive statement, a statement which in its essence remained almost unchallenged in Germany throughout the nineteenth century and still commands the allegiance of the majority of political thinkers. Sovereignty from this standpoint is the right or power not of any individual or sum of individuals but of the whole conceived as an organic unity with a real personality of its own. "The State," Hegel wrote, "is the realized ethical idea . . . the realized substantive will, having its reality in the particular self-consciousness raised to the plane of the universal. . . . This substantive unity is its own motive and absolute end. . . . This end has the highest right over the individual, whose highest duty in turn is to be a member of the State."<sup>24</sup> Here is the kernel of the Hegelian idea, stripped of the occasional hyperbole which leads the philosopher to proclaim the State as the appearance of the divine idea on earth or to speak of it as "this actual God."

Thus the State is, analogically, at least, an organism; but an organism has a number of different organs with different functions. Likewise the State, which in its constitution sees a differentiation of the whole into its organic functions, the

<sup>24</sup> "Der Staat ist die Wirklichkeit der sittlichen Idee. . . . Der Staat ist als die Wirklichkeit des substantiellen Willens, die er in dem zu seiner Allgemeinheit erhobenen besonderen Selbstbewusstsein hat, das an und für sich Vernünftige. Diese substantielle Einheit ist absoluter unbewegter Selbstzweck, in welchem die Freiheit zu ihrem höchsten Recht kommt, sowie dieser Endzweck das höchste Recht gegen die Einzelnen hat, deren höchste Pflicht es ist, Mitglieder des Staats zu sein," *Philosophie des Rechts*, §§257-258. Gooch, *op. cit.*, p. 748, says well of Hegel: "While Kant and Humboldt failed to grasp the full significance of the nation and the State, and Fichte only realized it when Prussia lay prostrate before the invader, Hegel made it the starting point of his philosophy. . . . He was, indeed, the first German thinker to concern himself seriously with the nature of the State, and no subsequent German thinker except Nietzsche has belittled it." He continues, p. 749, to point out that Hegel's State, despite the accusations which have been leveled against it, is held together not by force but by the spirit of order: "It is a spiritual structure, the highest embodiment of reason, the guardian of liberty. Such a man, whatever his faults, is on the side of the angels."

development of the idea within itself. The political constitution is, according to Hegel, "the organization of the State and the process of its organic life in reference to its own self."<sup>25</sup> This organic self-differentiation of the idea results in a division into three substantive branches: the legislative, the administrative-judicial, and the monarchical. That these particular offices and functions can be resolved into the unity of the State constitutes the sovereignty of the State, but this sovereignty is "merely the ideality of all particular powers."<sup>26</sup> As an actuality this ideal unity and personality of the whole exists in the person of the monarch—it must be remembered that for Hegel "the perfecting of the State into a constitutional monarchy is the work of the modern world, in which the substantive idea has attained the infinite form"<sup>27</sup>—but Hegel saw this real personality of the monarch as being in its essence only the architectonic peak and concrete reality of the formal unity of the State. True, when the monarch says "I will," to legislative or executive proposals which are presented to him for approval, the State says "I will" through him, but this, far from signifying that his will is the State's will, indicates rather that, although there can be no State will without him, he merely gives the subjective conative form to an already determined content.<sup>28</sup>

In the sphere of the external relations of the State, sovereignty comes to play a more considerable and positive part in the Hegelian system. From this aspect it is seen as no less than "the true, absolute, final end."<sup>29</sup> The primary absolute right of the State is that its sovereign independence be recognized, and the relation between States is that of Powers

<sup>25</sup> "Die Organisation des Staats und der Prozess seines organischen Lebens in Beziehung auf sich selbst," *op. cit.*, §271.

<sup>26</sup> ". . . die Idealität aller besonderen Berechtigung," *ibid.*, note to §278.

<sup>27</sup> "Die Ausbildung des Staats zur konstitutionellen Monarchie ist das Werk der neueren Welt, in welcher die substantielle Idee die unendliche Form gewonnen hat," *ibid.*, note to §273.

<sup>28</sup> Of the position of the monarch in a constitutional monarchy Hegel says that "for this office is needed only a man who says 'Yes,' and so puts the dot on the 'i.' The pinnacle of the State must be such that the private character of the occupant shall be of no significance," *ibid.*, note to §280.

<sup>29</sup> *Ibid.*, §328.

whose difficulties must ultimately find solution on the battlefield. The Kantian conception of eternal peace found scant favor here. Nor did Hegel regard war as by any means wholly evil, for it emphasizes the individuality of the State, promotes its conscious unity, and is in the service of that sovereignty which is of the essence of the State. This conception of the State as *Macht* was fated in later days to receive the stamp of an almost official orthodoxy at the hands of its chief exponent, Treitschke, and his disciples.

The third of Hegel's great contributions—the conceptual severing of State and society—is discussed below in relation to the early days of German sociology and Socialism.

Hegel, it has been said, “builds up a synthesis of all the ideas which moved his time. Under his powerful hand this synthesis remains a uniform, consistent structure; after him, to be sure, it must immediately fall apart again.”<sup>30</sup> In the future development of some of these varied elements which entered into the Hegelian system the influence of Hegel is clear and unmistakable; in that of others only the most distant relationship can be established. Greater stress laid on any one of these elements at the expense of the rest would lead to a system totally different in its implications from that which Hegel had put forth. In this way, at the two extremes, Karl Marx and Treitschke, both, in a sense, Hegelians, were able to evolve systems, one of which reduced the State to a puppet in the hands of economic forces, while the other extolled the glory and power of Imperial Germany. In consequence, to trace the development of German political thought in the nineteenth century, is, almost without exception, to trace the development of ideas which had formed an integral part of the Hegelian system, but it is very far from being a mere recital of the direct Hegelian influence.

<sup>30</sup> F. Meinecke, *Weltbürgertum und Nationalstaat*, 6th ed., 1922, p. 278. Cf. Krieck, *op. cit.*, p. 119.

THE THEORY AND PRACTICE OF  
CONSTITUTIONALISM

Before going on to consider the work of the thinkers who followed Hegel it may be well to glance rapidly at the political history of the years that intervened between the end of the Napoleonic Wars and the granting of the Prussian Constitution in 1850. The War of Liberation won, Germany was faced by two interrelated problems: on the one hand, the attainment of a political unity which should give concrete expression to the potent forces of nationalism roused by the long struggle and all that it had brought with it; on the other, the attainment of representative constitutional government.

In neither connection is it possible to ignore the work of the great German statesman of the period, the Freiherr vom Stein, although it is true that the realization of these two ideals was delayed until long after his retirement from active political life. It is unnecessary to do more than mention the achievements of Stein in rallying and organizing the forces of Germany against Napoleon, in emancipating the serfs, reconstructing the administration of Prussia, and developing a system of local self-government. The success of his political genius in these fields has been too often discussed to require further elaboration here. But in his defeats no less than in his victories Stein has a just claim to greatness: he foresaw the needs of the future, and later generations were forced to adopt the measures which he had advocated.

The disunity of Germany and the ever recurring disasters and humiliations that it entailed were clearer to Stein, perhaps, than to any other German of his day. He spoke and acted always as a German patriot. "I have but one Fatherland, which is called Germany," he wrote, "and since according to the old constitution I belonged to it alone, and not to any part of it, I am devoted with my whole heart. To me in this moment of transition, the dynasties are completely indifferent; they are mere instruments; my wish is that Germany should become great and strong, that she may recover her independence, her self-government and her nationality.



. . . My confession of faith is unity, and if that is not attainable, then some shift, some transition stage.”<sup>31</sup> There is no need to enter into the details of the plans proposed by Stein for a German federation. He himself in fact was ready to accept almost any plan which would guarantee the future unity and independence of Germany, and was prepared to sacrifice his ideal scheme of complete unification under a single emperor to the practical possibilities of a situation in which neither Austria nor Prussia was willing to concede the predominance of the other.

If the essentially practical and realistic character of Stein is to be seen in his several proposals for German unity, it appears no less clearly in his demand for a constitutional monarchy limited by the representatives of the nation. Here is no plea for the expression of a *volonté générale* founded on a social contract: Stein was concerned not with the philosophical and ethical problems, but with the necessity of building up a strong and efficient government which should call out and utilize the best that its subjects could give it. The right and power of the king were to remain sacred, he insisted in his *Political Testament*, but beside the king there must be a universal national representation to inform the sovereign power of the wishes of the nation and to give life to its decrees. “When the nation is entirely denied a share in the operations of the State,” he declared, “it is speedily led to regard the Government as either indifferent, or in particular cases as even opposed to itself.”<sup>32</sup> In the declaration which he drew up for the Emperor Alexander concerning the German Confederation he made a special point of insisting that in the States comprising the Confederation estates should be formed which should have the right of consenting to laws and taxes and of scrutinizing the administration. It was possible, he suggested elsewhere, to build anew in the construction of parliaments, but his preference clearly lay

<sup>31</sup> Cited by J. R. Seeley, *Life and Times of Stein*, 1878, III, 17. Treitschke says of Stein's desire for German unity: “Für diese Arbeit, die ihm die heiligste aller irdischen Angelegenheiten blieb, setzte Stein die ganze Wucht seines heroischen Willens ein”; *Deutsche Geschichte im neunzehnten Jahrhundert*, 2d ed., 1879, I, 678.

<sup>32</sup> Seeley, *op. cit.*, II, 290.

on the side of utilizing the old traditional institutions in so far as the forces they represented might be turned to the service of the State.

The first of these two great problems with which Stein concerned himself resolved itself immediately into a conflict between Austria and Prussia for dominance, with the smaller States on the whole throwing their weight on the side that promised them the greater measure of independence; the second revolved around the abhorrence of the sovereign kings and princelings for anything which would detract from their cherished absolutism. For the theory of sovereignty it is the latter of these two struggles which first becomes of importance; the former, broadly speaking, did not find its way into systematic theory until Bismarck had brought political unity within reaching distance, exposing the paradox that lay at the heart of a federal union of sovereign States.

The slow spread of constitutionalism, however, which occupied the whole of the first half of the century, was from the outset a matter of vital consequence to theory. It was a battle which was fought as vigorously in the classroom and the technical work on political and juristic theory as it was in the antechambers of the diplomats and the barricaded streets of Berlin and Vienna. The growth of constitutionalism in Germany was at once a product of pre-Revolutionary speculation and a protest against its consequences. That there were certain broad rights of man for which guarantees must be found was an inevitable deduction from the natural law premises which had guided, with few exceptions, the pens of the outstanding French and English thinkers. Where better could these guarantees be found than in the separation of powers which Montesquieu had introduced to the Continent as his version of the constitution which had been the stronghold of British liberty? But such a separation of powers demanded a constitution in which the prince became only one organ for the expression of the will of the State, checked by other organs the boundaries of whose sphere of power he could not transgress. Only in rare instances did German thought risk the leap to the conclusion that the Gor-

dian knot might best be cut by the elimination of the monarchic factor. In the first place, there was virtually no inclination to break with the honored tradition of affectionate obedience to the prince;<sup>33</sup> in the second, it had seen the consequences of such fearless logic in the chaos that had reigned across the Rhine and in the dictatorship which followed it. The demand was for a constitutional monarchy in which the people exercised a degree of power jointly with the prince, doing away with an arbitrary absolutism and enforcing respect for certain fundamental rights. Yet it was not until Frederick William IV in 1848 capitulated to the popular outcry in Prussia that the battle for German constitutionalism was finally won.

That it should have required nearly half a century to bring about what we now recognize to have been inevitable is not surprising when one considers the magnitude of the change involved in passing from absolutism to constitutional monarchy. All the conservative forces of Germany—if one except such men as Stein—were arrayed on the side of the *status quo*, and the great masses of the people were not ready to take any decided action on either side. Furthermore, the way was inevitably blocked by the desire of the German princes to enjoy in peace the sovereign rights which had accrued to them when the Emperor in 1806 had formally abdicated the Imperial throne. And behind the princes there stood a not inconsiderable body of political thought.

The most redoubtable of these intellectual fighters for the ancient ways was von Haller, in the title of whose principal work,<sup>34</sup> as in that of von Humboldt, it is not difficult to read the secret of his thoughts. In the ten years immediately following the Congress of Vienna he gave to the world in no less

<sup>33</sup> To cite a single, but typical, instance: Zöpfl in an 1848 pamphlet advocating constitutional monarchy insists that the German people after the War of Liberation, while demanding comprehensive recognition of republican principles, "did not desire more than that these be guaranteed and secured under the aegis of the monarchic principle"; *Constitutionelle Monarchie und Volkssouveränität*, p. 10. See C. F. von Gerber, *Grundzüge eines Systems des deutschen Staatsrechts*, 1865, p. 9, note 1 (p. 10).

<sup>34</sup> K. L. von Haller, *Restauration der Staatswissenschaft, oder Theorie des natürlich-gesellschaftlichen Zustandes der Chimäre des künstlich-bürgerlichen entgegengesetzt*, 1816-1825.

than six volumes his *Restoration of Political Science, or the Theory of the Natural State of Society Opposed to the Chimera of the Artificial and Civil*, a work which Hegel cavalierly dismissed as "all this incredible crudity."<sup>35</sup> The six volumes are an extended commentary upon the proposition that it is a part of the eternal and unalterable order of God that the more powerful should rule, must rule, and always will rule, tossing to their grateful subjects such sops of law and justice as may appeal to their sovereign fancy.

To this policy of reactionary inertia, which held Germany back from accomplishing the reforms recommended by Stein, Metternich gave warm support in the conviction that it would aid in the reëstablishment of the traditional Austrian hegemony over a loose confederation of German States. Intellectual opposition to it was carried on until 1848 only by a relatively small band of liberals, and time was required before their views could filter down to the backward, serf-like populations of many of the States.

In the Act of Confederation of 1815, largely dictated by Metternich and guaranteed by the Great Powers, it was expressly stated that the purpose of the Confederation was to maintain the security and independence of the "sovereign princes and free cities" which composed it. The sovereignty of the several States was guarded by the provision that no important decision could be arrived at without unanimous approval. The thirteenth article declared—in a vacuum, as was later to become apparent—that all the States of the Confederation would have a representative constitution of estates.<sup>36</sup> "Measured by the requirements of a real State," commented von Sybel, scornfully, "the German Act of Confederation, brought into being with so much effort, possessed

<sup>35</sup> *Philosophy of Right*, note, p. 246. Heinrich O. Meisner, *Die Lehre vom monarchischen Prinzip im Zeitalter der Restauration und des deutschen Bundes*, 1913, p. 139, comments that Haller set up an "alleinseligmachendes Staatsideal," "das er sich, geblendet durch das im Lehnswesen steckende privatrechtliche Prinzip, aus einem Gemisch feudalistisch-patrimonialstaatlichen Erinnerungen gebildet hatte." Cf. Meinecke, *op. cit.*, 10<sup>tes</sup>. Kap.

<sup>36</sup> "In allen Bundesstaaten wird eine landständische Verfassung stattfinden."

pretty completely every flaw through which a constitution can become unusable."<sup>37</sup>

Nevertheless for more than thirty years this makeshift instrument, which in no place mentioned the German nation, was the ostensible basis of German political life. A twist was given to the reactionary screw in 1819 by the Carlsbad decrees, and in 1820 the Final Act of Vienna confirmed the independence of the several States by asserting that the Confederation was "an international union (*völkerrechtlicher Verein*) of sovereign princes and free cities." Furthermore, in virtual denial of the thirteenth article of the original act, it was affirmed that since the Confederation, with the exception of the free cities, was made up of sovereign princes, the whole power of the individual States must remain concentrated in the head of the State, who could be bound by the coöperation of the estates only in the exercise of certain definite rights.<sup>38</sup>

Within the States themselves, constitutionalism, faced by the active hostility of Austria and Prussia, advanced at a snail's pace. In Prussia the sentimental Frederick William III had promised a representative constitution at the close of the War of Liberation, but after six years' delay he revoked his promise, although part of the program—the establishment of provincial diets—was carried out in 1823. The accession of Frederick William IV to the throne in 1840 led to high hopes that a change of policy would bring with it the long-awaited liberal constitution, but the king soon demonstrated the futility of these hopes. Against the counsel of Nicholas I of Russia and Metternich, he did, however, in 1847 call a United Diet—a concentration of the provincial diets—which in its brief life served only to demonstrate that the liberalism of the king was very far distant from that of many of his subjects. That there was little basis for agreement is indicated by the general tenor of the speech with

<sup>37</sup> H. von Sybel, *Die Begründung des deutschen Reiches durch Wilhelm I*, I Bd., 1890, p. 48. Meisner, *op. cit.*, p. 112, considers "die Gründungsurkunde der heiligen Allianz als Brennpunkt religiöser, patriarchalischer, patrimonialen und legitimistischer Ideen."

<sup>38</sup> Schluss-Akte, Art. 57. This official statement and affirmation of the monarchic principle had considerable influence.

which he opened its sittings: "No power on earth shall ever succeed," he proclaimed, "in persuading me to exchange the natural relation between king and people for a conventional, constitutional one; and neither now nor ever will I permit a written sheet, like a second providence, to thrust itself in between our God in heaven and this land to displace the old sacred fealty."<sup>39</sup>

But the power which was to succeed in breaking down this "natural relation" was already gathering its forces in France. The revolutionary wave of 1830 had had comparatively little effect in Germany; that of 1848 swept everything before it for the moment at least. At Frankfort the Liberals of all Germany met to build the framework of the nation-State; in Vienna Metternich was driven from power; in Prussia the king turned Liberal, diverted attention from home affairs by asserting that from "henceforward Prussia takes the lead in Germany," and summoned a constitutional convention. Still the time was not yet ripe for any permanent advance.

Heinrich von Gagern, first provisional president of the Frankfort Parliament, truly echoed public sentiment in his presidential address to his colleagues: "We have the greatest task to fulfil: we are to fashion a constitution for Germany, for the whole realm. The justification and the authority for this task lie in the sovereignty of the nation. . . . Germany wants to be one, one realm, governed by the will of the people with the coöperation of all its component members." It was in this spirit that the problem was attacked, but the difficulties inherent in it, the clash of opinions within the Parliament, and the protracted theoretical character of the proposals and debates served to dampen the popular enthusiasm until in the following year the Parliament died a gradual and neglected death. The constitution finally adopted, which suffered its deathblow in the refusal of the Prussian king to receive the Imperial crown from the hands of the people, was of markedly federal character, with an hereditary emperor clothed with executive powers and a suspensive veto, a senate representing the constituent States, and a

<sup>39</sup> Cf. W. Müller, *Political History of Recent Times*, 1882, p. 168.

popular assembly, chosen by direct election from the nation, in which ultimate power resided.

A similar train of events followed the calling of the constituent assembly in Berlin. By the time it had agreed upon a formula the tide had turned toward reaction, and the king, in dismissing the assembly, was able at the same time to impose a constitution, modeled on that of Belgium, concerning which the assembly had not been consulted. Of this document with its provision for two chambers appointed and elected on a class basis and its elaborate bill of rights, perhaps the most interesting feature was the scope which it left for free action on the part of the king—an advantage which Bismarck was far from neglecting in days to come. Despite its inadequacy, however, it can be said to mark the final downfall of absolutism in Germany and the beginning of representative constitutional government. The period of reaction which set in after the upheavals of 1848 was comparatively short-lived. Its end came when Bismarck shut the door upon oratory, and made blood and iron his materials for the forging of the Empire.

It is unnecessary to stress the importance of the constitutional principle for the theory of sovereignty. Implicit in it is the conception of a whole greater than any of its parts: the constitution determines the functions of the parts and the limits within which they may operate. Obviously, if the classic formulas of sovereignty are to be applied, it cannot be any one of the organs or parts thus determined and limited which is the bearer of a power "supreme, irresistible, absolute, uncontrolled." Either the classic formulas must be pushed to one side to make room for new conceptions applicable to changed conditions, or some higher unity must be postulated which shall be the subject of the absolute sovereignty denied to the organs with their derived and relative powers. In this latter solution, the higher unity is for the most part found in the people, the nation, or the State. The great majority of German thinkers, following in the path of Hegel, accepted of these three the State as the fitting (and, it may be added, least objectionable) subject of the powers which had, formally, at least, been divided from the person

of the monarch.<sup>40</sup> But it was possible to have whole-hearted agreement here and still to find radical divergences of opinion when the problem of the actual exercise of sovereignty made its appearance.

In the earlier days of philosophy in the grand manner, petty details such as this were of no considerable importance to the universal systems that were being promulgated. Kant and, in a less practical degree, Schelling had both accepted constitutionalism, but their discussion of it had been so much in the abstract as scarcely to lend itself to anything approaching juristic analysis. Hegel, although still decidedly in the grand manner, was somewhat closer to existing reality, but there is about his State no little to justify the hostile Bluntschli's criticism that it is only "a logical abstraction, not a living organism; a mere logical notion, not a person."<sup>41</sup>

The way to a more technical statement of the problem lay through the writers who were at the same time playing an active part in the political life of their time. If they contributed little directly to the development of the theory of sovereignty, their indirect influence in bringing political thought down from the lofty but abstract realm of metaphysics to the plane of political and juristic practice was considerable. Work of the first order in this sphere was done by Friedrich von Gentz in introducing the brilliantly realistic conservatism of Burke to Germany.<sup>42</sup> At first a disciple of Kant, he passed through a phase of conservatism which

<sup>40</sup> To be sure, where the monarchic principle remained strong, as in the customary juristic rendering of the Prussian Constitution, the king virtually retained sovereignty since the Constitution and the powers therein delegated were regarded as having flowed from the sovereign power of the king. Cf. Meisner, *op. cit.*, p. 2. An interesting construction of the situation in a democracy is given by Hans Kelsen, *Vom Wesen und Wert der Demokratie*, 1920, p. 10: "Der Protest gegen die Herrschaft von meinesgleichen führt im politischen Bewusstsein zu einer Verschiebung des Subjektes der —auch in der Demokratie unvermeidbaren— Herrschaft: zur Konstruktion der anonymen Person des Staates."

<sup>41</sup> J. K. Bluntschli, *The Theory of the State*, 3d ed. of English translation from 6th German ed., Oxford, 1901, p. 73.

<sup>42</sup> Gentz's translation of the *Reflections on the French Revolution* appeared in 1794, considerably augmented by his own comments on Burke. He also translated several French works of the same conservative character. Of his original works the chief are *Über den Ursprung und Charakter*



ultimately led him, not without disgrace, into the service of Metternich and the worst of the reaction. In striking contrast to his earlier work on the French Revolution and to the *Denkschrift* pleading for liberty which he daringly addressed to Frederick William III on the latter's accession to the Prussian throne in 1797, is his later conduct as champion of "law and order" at any price in the years following the Restoration.<sup>43</sup>

An even smaller contribution to systematic theory was made by the liberal and constitutionalist leaders—such as Arndt, Bunsen, Dahlmann, Radowitz, von Gerlach, von Gagern, and many others<sup>44</sup> whose work culminated in the Frankfort Parliament. For them the necessity of throwing off the chains of the reaction and finding a means of expression for the German nation was too pressing and too vital to admit of any close analysis on their part of the constitutional problems which were being worked out in detail by more secluded thinkers.

In the intellectual analysis of constitutionalism and of the problems involved in reconciling it with the monarchical principle, work of the highest importance both from a theoretical and from a practical point of view was done by Friedrich Julius Stahl, whose doctrines, to judge from the favor which they received in Berlin, may be taken to represent those current in the Prussian court of the day. A Jew, baptized into the Lutheran Church at the age of nineteen, Stahl combined in himself an almost medieval theological standpoint with a high appreciation of many things distinctively

*des Krieges gegen die französische Revolution* and *Von dem politischen Zustande von Europa vor und nach der Revolution*, both of 1801.

Gentz was also largely responsible for the enthusiastic championing of Burke by Adam Müller. See Frieda Braune, *Edmund Burke in Deutschland*, 1917.

<sup>43</sup> See von Mohl's curious comment: "Wir haben Niemand der Gentz ersetzt, aber Gott verhüte auch, dass seinesgleichen vollkommen wieder erscheine"; *Die Geschichte und Literatur der Staatswissenschaften*, 1855, p. 511. The *Allgemeine deutsche Biographie* acclaims him as "erster Publicist Deutschlands."

<sup>44</sup> For the years before and after 1848, and the figures and ideas which dominated them, Meinecke's *Weltbürgertum und Nationalstaat* is of course invaluable.

modern.<sup>45</sup> In general terms, his position may be said to be midway between the reactionary principles of von Haller and the liberalism of the leaders who gathered at Frankfort. In consequence both the more extreme right and left wings were inclined to regard him as at least a potential enemy.

The doctrines of Stahl, like those of Hegel, though in less degree, may be interpreted very differently through stressing one or the other of the elements from which he composed them. Thus, although he regarded constitutional monarchy as the best form of government, and is indeed held by some to have been the most important exponent of that form in Germany, still divine right is the kernel of his system. His starting point is the religious one, and his argument is in brief that God institutes the State and civil authority for the realization of the divine moral order. Hence, he argued, all *Obrigkeits* is "from God not only in the general sense as all rights are from God, but in the entirely specific sense that it is the work of God which it performs." The king, who is to be regarded as the personification of the State, is "the personal center of all force. He is the born ruler with innate majesty, . . . the dome of the terrestrial structure; and a reflection of the glory from above rests on him."<sup>46</sup> But the divine right of authority is not limited to monarchy alone: the same principle holds, according to Stahl, for republican assemblies and magistrates no less than for the king, be he elective or hereditary, since it is from God alone that the power and authority of office can come.

Sovereignty, Stahl held, is one and indivisible, as is every personality and will. In monarchy the whole power of sovereignty is vested in the king as the person who represents the

<sup>45</sup> A distinguished French writer compares him to de Maistre and Bonald; Janet, *Histoire de la science politique*, 3d ed., 1887, II, 743. See also C. E. Merriam, *History of the Theory of Sovereignty since Rousseau*, 1900, chap. III.

<sup>46</sup> *Die Philosophie des Rechts*, II Bd., II Abth., 3d ed., 1856, pp. 179-180. Gooch, *op. cit.*, p. 750, says that "Stahl stands out as the chief creator, or at any rate the chief formulator, in modern Germany of the doctrine of divine right." It was the verdict of a contemporary critic that his works "furnish an arsenal from which every theory of absolutism and sham constitutionalism donning the cloak of religion can secure its weapons"; H. Ahrens, *Naturrecht*, 6th ed., 1870, I Bd., pp. 165-166.

State, but in a republic where sovereignty is exercised by the popular assembly the situation is not as clear. Here, Stahl remarks, "sovereignty, which according to its nature should be indivisible, is nevertheless to a certain extent divided between the popular assembly and the magistrates."<sup>47</sup> The indivisible nature of sovereignty also led Stahl to make a strong attack on the doctrine of the separation of powers as put forward by Locke and Montesquieu, with its reduction of the king to a mere executive organ. Real constitutionalism, he protested, could be attained through no such mechanical dividing up of sovereignty between different persons, but only through an organic structure developing within and from the original and continuous unity of sovereign power.

In this context it is not surprising that Stahl should give to the parliament or *Stände* only a negative function. The king as sovereign represents the State both internally and externally, and his power can by no means be confined to a mere formal issuance of commands the substance of which has been determined elsewhere. He may indeed be limited negatively in such a way as to make it obligatory upon him to consult or even take the advice of others before he can undertake certain kinds of actions, but he can never be forced to act against his will. Thus the parliament or estates may be empowered to prevent the king from acting, but they can never themselves make the effective final decision as to what shall be done. The primary function of the estates is little more than to present to the sovereign a concrete statement of the opinion and desires of the people in order that the king's ultimate decision may be a better informed one; but Stahl is careful to add that the estates have power "only through and in the king, from whom alone as sovereign, all power and worth in the State can proceed."<sup>48</sup>

This version of the position of the prince in a constitutional monarchy, as will be shown below, was fated to have

<sup>47</sup> *Die Philosophie des Rechts*, *op. cit.*, p. 191, note 2.

<sup>48</sup> *Ibid.*, p. 328, Meisner, *op. cit.*, pp. 305 f., points out Stahl's difficulty in keeping his divinely authorized monarch within the limits of law and State.

relation to all the other powers of the State which are derived from and responsible to it.<sup>53</sup> The normal manifestation of sovereignty on the part of the State is legislation, the laying down of the legal limits within which all its subordinate elements must operate.

But sovereignty must also find a resting place within the State; one among the organic instruments of its power must subsume the rest, must represent in concrete form its majesty and dignity. Although Bluntschli conceded that this might be given collective expression in a republic, he was convinced that its only truly adequate expression was to be found in the constitutional monarchy in which "the monarch is, in the supreme sense, the personality of the State (*Staatsperson*)."<sup>54</sup> Against the like conception of Hegel he protests on the ground that the latter has almost wholly destroyed the individual personality of the monarch. Not only must there be a substantial concentration in the prince of the highest dignity and power of the State, but he must also be completely free within certain limits to exercise the supreme power assigned to him. These limits are laid down primarily by the constitution—Bluntschli insists that the prince is within the constitution, not outside or above it—and secondarily by the laws which are adopted by the State as a whole, that is, by the concurrence of the people and the aristocracy in their chambers and of the prince himself. The constitutional monarch "can only expect and demand obedience as regulated by the constitution and the laws."<sup>55</sup> Between the sovereignty of the State and the sovereignty of the prince, Bluntschli found the same harmony as between the whole man and his head. "The sovereignty of the State is especially that of the law; of the prince that of the government or administration. The latter operates where the former is inoperative. A conflict between them is rare in fact and impossible in principle; for it would imply a conflict of the head

<sup>53</sup> "The Theory of the State," *op. cit.*, pp. 506-510.

<sup>54</sup> *Ibid.*, p. 431. "The essence of Monarchy is the personification of the majesty and sovereignty of the State in an individual." •

<sup>55</sup> *Ibid.*, p. 437.

alone with the head in combination with the rest of the State, and thus a conflict of the same person with himself."<sup>56</sup>

Essential to Bluntschli is the conception which he held in common with many other German thinkers that "constitutional monarchy recognizes the medieval principle that all authority starts from above and descends to the various lower stages, that government proceeds from the center to the circumference, and not in the reverse direction."<sup>57</sup>

Bluntschli gave the conventional theory of the day with variations, and with the breadth and independence of an original thinker. A somewhat more typical version of the accepted juristic theory may be found in the writings of the jurist Warnkönig. Here sovereignty, without which there can be no State, "is to be conceived as the general will of the State vested with full totality of power (*jeder Machtvollkommenheit*) and standing above every individual will. . . . Sovereignty is hence the highest earthly power, legally irresistible, inviolable, irresponsible (*majestas*), indivisible, permanent, exclusive, and the source of all public powers in the State."<sup>58</sup> Absolute in positive law, it is, however, limited in fact by the purpose of the State and by the whole body of moral, religious, and political convictions of the people. As the supreme bearer of this sovereignty appears the constitutional monarch, invested in turn with full totality of power.<sup>59</sup> As the State in its abstract sphere, so the monarch, in his concrete one, is endowed with all the classic attributes of sovereignty, even though he be constitutionally bound to accept the coöperation of the estates.

<sup>56</sup> *Ibid.*, pp. 503-504. It is difficult to conceive a more striking illustration of the dangers of picture-thinking.

<sup>57</sup> *Ibid.*, p. 436.

<sup>58</sup> I. A. Warnkönig, *Juristische Encyclopädie*, 1853, p. 479.

<sup>59</sup> Warnkönig, "Die gegenwärtige Aufgabe der Rechtsphilosophie," *Zeitschrift für die gesamte Staatswissenschaft*, 7 Bd., 1851, p. 497. "Der Souverän ist also aufzufassen als der zur Person gewordene, mit aller Machtvollkommenheit ausgerüstete Staatswille. Er muss aber diese Machtvollkommenheit als Eigentum besitzen," *ibid.* It is to be feared that Warnkönig was somewhat tainted by contact with natural law theories since he postulates an original constitutive power in the community which disappears as soon as the sovereign is established. See also his *Rechtsphilosophie oder Naturlehre des Volkes*, 1839.

Only very rarely in post-Restoration German speculation are writers to be found denying the formal validity of this conception of the State as sovereign person. The only two publicists of any considerable repute even in their own day who did so were Romeo M. Maurenbrecher and Heinrich Zöpfl, the former combating the theory on positivistic juristic grounds, the latter from the more general standpoint that it was theoretically untenable. Maurenbrecher started from the assumption that sovereignty in hereditary monarchies is a purely private right, a personal possession of the prince,<sup>60</sup> and that although the prince may concede both personality and sovereignty to the State, this had historically not been the case in Germany.

Zöpfl made a more radical attack upon the theory, accepting Maurenbrecher's historical conclusions, but denying that the prince, 'as the concrete reality of the will of the State, could be conceived as the mandatory or representative of the power of any other abstract "personality."<sup>61</sup> The State, he argued, could have personality only through, in, and with its ruler. Contrary to the then current view he asserted that the sovereignty of the State appeared only when it had been embodied in a personal sovereign. Until the personality of the State received concrete embodiment, Zöpfl held it to be an abstract concept, incapable of willing or acting, and without meaning.

These writers and some of their more obscure contemporaries were attempting to deal with the developing modern State—its appearance in Germany cannot be dated much earlier than the Napoleonic Wars—with essentially the same tools as had sufficed for, and, in fact, had been evolved from, the analysis of the slow-dying feudal-patrimonial German State. The long period of reaction following the Restoration lent color to the thesis that the German world at least had been able to remain fixed and stable in an era of universal revolution and change. This attitude was comparatively

<sup>60</sup> *Die deutschen regierenden Fürsten und die Souveränität*, 1839, p. 167. Maurenbrecher is obviously in the direct line of descent from Haller.

<sup>61</sup> *Grundsätze des allgemeinen und deutschen Staatsrechts*, 4th ed., 1855-1856, I, 89.

short-lived, however, and all the significant thinkers of the day realized that a breach with the past was inevitable. The State had become a public thing, and was no longer a private one. The prince exercised sovereignty not because the State belonged to him or because he was the State, but because, as Frederick the Great had suggested, his function in the great organism of the State was to give concrete expression to its sovereign will. The effect of the practical attainment of constitutionalism was greatly to stimulate the theoretical appreciation of these facts and to give impetus to the growing movement for a new jurisprudence.

The chief development in this direction—the birth of a new school of jurisprudence in Germany, with Albrecht and Gerber as its fathers, and Laband, Jellinek, and Otto Mayer as its most notable sons—must be left for the succeeding chapter, but it will be possible to glance briefly here at one or two other phases of German political and juristic thought which were prominent in the two or three decades before 1871.

### SOVEREIGNTY AND ADMINISTRATION

One of the most important phases of the vast political changes that were taking place in Germany during the nineteenth century was the appearance of a host of new problems in connection with the executive, involving a reformulation both of the principles and of the details of administrative law. The development of German administrative law, never other than a haphazard one, may be divided into three great periods.<sup>62</sup> In the Middle Ages the feudal lord was the subject only of certain distinct sovereign rights, and opposed to these were the, in theory, equally valid *wohlerworbene Rechte* of his vassals. Where the lord overstepped his rights and transgressed those of the vassal, the latter might, again

<sup>62</sup> For the history of administrative law in Germany, see: Georg Meyer, *Lehrbuch des deutschen Verwaltungsrechtes*, 3d ed., 1910, pp. 36-43; Gerhard Anschütz, "Verwaltungsgerichtsbarkeit," *Handbuch der Politik*, 2d ed., 1914, I, 318 ff.; Otto Mayer, *Deutsches Verwaltungsrecht*, I, 1895, §§3-6; E. Laferrière, *Traité de la juridiction administrative*, 2d ed., 1896, I, 38 ff.; Rudolf von Gneist, *Zur Verwaltungsreform und Verwaltungsrechtspflege in Preussen*, 1880, pp. 7-16.

in theory, defend himself in the courts of the Empire, which, in such cases, acted as impartial administrative tribunals.

The second phase—that of the *Polizeistaat*—began in the period after the Renaissance, and finished early in the nineteenth century. With the birth of the sovereign territorial State, the several rights of the local rulers were gradually amalgamated into a single right, that of absolute supremacy. Against the sovereign there could be no legal plea, and his wish was law, overriding all preëxisting rights, no matter how well established, that might stand in his way. Any sacrifice that he might demand from the individual in the supposed interest of the whole must be conceded without hope of effective protest. In the reign of Frederick the Great, which marked the highest development of the *Polizeistaat* in Germany, it was laid down in an order of June 19, 1749, that the usual paths of justice were closed where the issue was a clash between public and private interests,<sup>63</sup> nor were any other means of self-defense allowed to the injured party save the right of appeal to officials higher in the bureaucratic scale. The value of this latter means of safeguard was greater, however, than might appear at first sight, since the ministers before whom the appeal would ultimately be heard were impartial servants of the king not likely to be swayed by party prejudice.

Toward the end of the eighteenth century there developed a further safeguard of the subject's rights through the subordination of the *fiscus* or public treasury to the civil courts. The *fiscus* was regarded as a juristic person, subject to private law demands made upon it by subjects damaged in their rights by administrative acts: in other words, the *fiscus* became "the whipping boy of the State." While the sovereign right of the State to deal with its subjects and their property as it chose remained unimpugned, it might still through the *fiscus* be held financially responsible for certain of its acts.

In this same period the independence of the judiciary came into general acceptance, but as the great majority of administrative matters were withdrawn from the cognizance

<sup>63</sup> Anschütz, *op. cit.*, p. 820.



of the courts this proved of little service to those seeking relief from executive interference and oppression.

In the nineteenth century the third phase opened with the appearance of the theory and practice of constitutionalism. This period centered around the struggle to transform the *Polizeistaat* into the *Rechtsstaat*. The ideal was no longer that the prince and his agents should be able to override all obstacles in the pursuit of their interpretation of the good of the commonwealth, but that the primary force should be that of the law. Law was to be the very essence of the State, not indeed determining the purposes of the State, but laying down the procedure by which those purposes could be defined and furthermore establishing inviolable norms for the attainment of the State's ends. The State, in the ideal of the *Rechtsstaat*, was to define precisely in terms of law the paths and boundaries of its activity and the spheres of freedom of its subjects, and to guarantee the inviolability of these boundaries and spheres.<sup>64</sup> The gradual introduction of party ministries made the desirability of such an ideal all the more clear since the impartiality with which appeals against administrative actions had previously been heard now tended to vanish.

In an attempt to rectify the situation at a single stroke the ill-fated Frankfort Constitution of 1849 proclaimed (§182) that administrative decisions in administrative cases were to cease: "The courts judge all violations of the law"; thus

<sup>64</sup> The conception of the *Rechtsstaat* was admirably formulated by Stahl in the often-quoted passage: "Der Staat soll Rechtsstaat sein, das ist die Lösung und ist auch in Wahrheit der Entwicklungstrieb der neueren Zeit. Er soll die Bahnen und Gränzen seiner Wirksamkeit wie die freie Sphäre seiner Bürger in der Weise des Rechts genau bestimmen und unverbrüchlich sichern und soll die sittlichen Ideen von Staatswegen, also direkt, nicht weiter verwirklichen (erzwingen), als es der Rechtssphäre angehört, d.i., nur bis zur nothwendigsten Umziünung. Dies ist der Begriff des Rechtsstaats, nicht etwa dass der Staat bloss die Rechtsordnung handhabe ohne administrative Zwecke, oder vollends bloss die Rechte der Einzelnen schütze, er bedeutet überhaupt nicht Ziel und Inhalt des Staats sondern nur Art und Charakter, dieselben zu verwirklichen"; *Die Philosophie des Rechts*, II Bd., II Abth., 3d ed., 1856, pp. 137-138. The introduction of the term *Rechtsstaat* is attributed to Robert von Mohl; cf. R. von Gneist, *Der Rechtsstaat*, 1872, p. 183, note 2.

taking up a stand directly opposed to all the French theory and practice since the Revolution.

It was thought at first that constitutional government would prove a sufficient, or, at least, an effective, instrument for the realization of the *Rechtsstaat* since it ensured the separation of the legislative and executive functions and established a mild system of checks and balances. Soon, however, it became apparent that the difficulties which stood in the way of the realization of the ideal were by no means dissipated by the erection of constitutional machinery. Where previous theory had concentrated its attention on the legislator, assuming that the function of the executive was merely the specific carrying out of the general provisions of the law, the generation which saw constitutionalism as an accomplished fact soon recognized that the process of administration was far from being as automatic as had been expected. Not only did the prince administer the law at his own pleasure and under his own interpretation, but no adequate safeguard was given against violations of the law by administrative officials. Furthermore, the prince had the right of issuing virtual laws in the form of ordinances or emergency legislation, and it was generally conceded that the assumption of competence was in his favor wherever the constitution omitted to give specific instructions.

Virtually no steps had been taken toward the *Rechtsstaat* before the constitutional era that followed the uprisings of 1848, although a few of the smaller States had introduced certain legal safeguards before that time; and with the imposition of constitutions far less was gained than had been expected. As one writer has put it, "the *Rechtsstaat* was proclaimed, but the *Polizeistaat* remained. It remained because they had neglected to hit upon effective protective machinery which should enforce attention to the principle of administrative legality in case of conflicts."<sup>65</sup> The monarch and his officials still moved in the spirit of the *Polizeistaat*:

<sup>65</sup> Anschütz, *op. cit.*, p. 320. The same writer continues to remark of Prussia in the period of reaction (1850-1858) after the granting of the constitution that "der *de jure* abgeschaffte *Polizeistaat* lebte *de facto* fort; niemals hat die preussische Verwaltung so ungescheut wie damals nach dem Grundsatz handeln dürfen: erlaubt ist, was mir gefällt."

the ordinary courts were not qualified to deal with administrative cases, and no other courts had been created. The minister, a party figure, thus played the double rôle of setting the administrative machine in motion, and, in the last instance, judging claims against it.

Otto Bähr was the first writer to see constitutionalism as an actuality and to give juristic treatment to this aspect of the problems involved in it. The *Rechtsstaat*, in the view of Bähr, is the State which establishes law as the fundamental condition of its existence; for him the day had passed when the relation between ruler and ruled could be regarded as merely that of authority and obedience. The modern constitutional relationship, he held, is to be explained only in terms of legally enforceable reciprocal rights and duties. "State and law," he wrote, "are inseparable conceptions. In the realization of law the State realizes the fundamental kernel of its own existence."<sup>66</sup> But if law is contained in the idea of the State, how is it possible that the executive, acting in the name of the State, can still go contrary to the provisions of the law which the State itself has proclaimed, and yet not be held responsible? The solution of this problem Bähr considered the most urgent political and juristic need of his time.

In the solution which he put forward Bähr followed the general lines which had been indicated by the Frankfort Constitution. Since law is of the essence of the State, Bähr argued that a State which did not heed the decisions of its own courts would be in contradiction with its own fundamental idea, while a law not fortified by enforced judicial decisions could win neither its true significance nor its rightful power. Therefore, he concluded, "to make the *Rechtsstaat* come true, it is not sufficient that public law be expressed in statutes: there must also be a judiciary qualified to establish what is right in the concrete case and thus give an indisputable foundation for the rehabilitation of law where it has been violated."<sup>67</sup> The best way to attain this end, Bähr held, was through the erection of courts qualified to deal with matters of public law, forming a part of the regu-

<sup>66</sup> *Der Rechtsstaat*, 1864, p. 8.

<sup>67</sup> *Ibid.*, p. 192.

lar judicial machinery of the State, and with a judiciary in part popularly elected, in part officially appointed.

Despite the great admiration evoked by Bähr's *Rechtsstaat* and the high esteem in which it has justly continued to be held, its influence on German practice and theory was slight. The leading rôle in both spheres in the reforms that were taking place was reserved for Rudolf von Gneist, whose many writings, based on an intimate knowledge of English constitutional and administrative history and method, virtually determined the character of the new German administrative era, especially in Prussia.

Like Bähr, Gneist was interested primarily in the executive rather than in the legislative function of the State, and he insisted that the *Rechtsstaat* could be achieved only through a reconstruction of the administrative system.<sup>68</sup> As a presupposition of the *Rechtsstaat* under constitutional party government Gneist demanded "the independence of the whole inner administration of the State from the change of ministers, from the shifting ministerial systems, from the irresistible tendency of the dominant party to make the possession of offices useful for vote-getting and party ends."<sup>69</sup> This, among other beneficial results, was to be attained through Gneist's version of English self-government: the administration and supervision of local affairs by locally selected honorary officials. Furthermore, he insisted that this reconstruction must follow the lines of legal responsibility for administrative acts—indeed it was to Gneist's studies of England that Bähr was indebted in part for his conception of a court with public law jurisdiction. In consequence, Gneist strongly advocated the erection of administrative courts qualified to deal with certain enumerated spheres of administrative activity, which should, contrary to Bähr's conception, be an integral part of the administrative machinery, and yet separate, at least in the higher spheres, from the ministry of the day.<sup>70</sup>

<sup>68</sup> R. von Gneist, *Der Rechtsstaat*, 1872, p. 16.

<sup>69</sup> *Zur Verwaltungsreform und Verwaltungsrechtspflege in Preussen*, 1880, p. 50.

<sup>70</sup> See his *Self-Government, Communalverfassung und Verwaltungsge-*

A similar stress was laid upon the necessity for legal control of the executive by Lorenz von Stein. In his definition, "every State in which every individual can establish his legal right against the administrative power through regular actions in the courts and through judgment and execution, is a *Rechtsstaat*."<sup>71</sup> To secure a theoretical foundation for this conception, Stein developed further the idea which Bähr had been working toward that the will of the State could not be regarded as one and indivisible in its several appearances: if it be so regarded, it is manifestly impossible to conceive it deciding and executing a decision against itself. Hence Stein concluded that there must be a sharp distinction drawn between the legislative power of the State with its statute (*Gesetz*), which must secure absolute supremacy, and the administrative power with its ordinance (*Verordnung*), which must, by judicial action, be held rigidly within the established legal norms.

### STATE AND SOCIETY

The fame of Stein, however, rests far less upon his juristic studies of the *Rechtsstaat* than upon the outstanding part which he played in the introduction of the pluralistic conception of the State as only one element of and a development from society.

A similar conception had entered into the system of Schelling, who saw society as a dialectical moment in the evolution of the State, but the first effective statement of this view in German political thought, if we except that of Althusius, was that of Hegel. Mohl's verdict is unquestionably valid that the "Hegelian 'civil society' (*bürgerliches Gesellschaft*) is no real being, no organism standing outside the State, but is rather only part of a logical process,"<sup>72</sup> yet by

*richte in England*, 3d ed., 1871, pp. 879-1018. It is interesting to note that Gierke held the influence of Gneist on legislation to have been perhaps greater than that of any previous theorist; *Rudolf von Gneist: eine Gedächtnisrede*, 1896.

<sup>71</sup> "Rechtsstaat und Verwaltungsrechtspflege," *Zeitschrift für das privat und öffentliche Recht der Gegenwart*, 6 Bd., 1879, p. 54.

<sup>72</sup> R. von Mohl, *Die Geschichte und Literatur der Staatswissenschaften*, 1885, I, 82.

emphasizing the Hegelian view of civil society as the forerunner of a State which is essentially an organization of organizations, it is clearly possible to resolve the apparent unity into an actual plurality. Of fundamental significance is the fact that Hegel, in marked contrast to the dominant theories since the Reformation, had justified the intrusion of a third element between the individual and the State. After Hegel the doors were open to a division of the science of politics into a science of society on one hand, and a science of the State on the other.<sup>73</sup>

Other pioneers in this field were the mystic Krause, who, lost in a maze of words, developed an obscure conception of an ascending series of human associations ultimately absorbed in an untranslatable "*Gottinnigkeit*"; J. F. Herbart, who saw men forming as many groups as they had common interests and unifying these groups under a single power, the State, in order to escape from the war of all against all; and Stahl, who established a number of groups, each with a vital principle of its own distinct from that of the State, only later to reduce them again to the rank of mere complementary members of the State.

Heinrich Ahrens, a follower of Krause, was the first to give the pluralist view an expression adequate to its importance. What had remained a minor element for other thinkers assumed in his eyes the dimensions of a key to the solution of all the new social and political problems which were just beginning to agitate mid-century Germany. For him, as for Herbart, there were as many organic groups and associations as there were important ends which could be pursued socially; of these some fell within the boundaries of the State, others extended far beyond it. The interrelated whole formed by these groups and associations he saw as society.<sup>74</sup>

<sup>73</sup> The most comprehensive study of Hegel's conception of society, linking it up to Stein, Marx, and Lassalle, is Paul Vogel's *Hegels Gesellschaftsbegriff*, 1925. He remarks that "der Gesellschaftsbegriff Hegels wurde die Beute des Nationalökonomien, des Soziologen und des Juristen. . . . Von Hegel über Stein bis zu Lassalle führt eine in sich geschlossene Gedankenbewegung," p. 122.

<sup>74</sup> *Juristische Encyclopädie*, 1857, p. 765.

Within society, he urged, the State is from one standpoint only one form of organization among many, from another it is the most powerful and most important of all, and may even be considered all-inclusive inasmuch as its essential function, the maintenance of law, is the *sine qua non* of unity. In other words, the State does not absorb society, as in the Hegelian system, but protects the rightful interests of each group from invasion by its fellows, promotes harmony among the several groups, and thus stimulates the vigorous development of their independent internal life. Although he had little liking for the alien term, sovereignty, Ahrens conceded that its substance must be granted to the State if the latter was to fulfil its functions. However great a degree of autonomy the State might leave to other associations, it still must always have the supreme legislative, executive, and judicial power in order to maintain its supremacy in the realm of law.<sup>75</sup> But Ahrens argued that sovereignty in a very real sense—as the underived right of inner self-determination—inhered in every association even though the norms governing its external activities were determined and enforced by the State. From this standpoint he sharply criticized the “unhealthy” concentration and centralization of all social power and vitality in the State, and demanded that federalism, both territorial and functional, be substituted for that hegemony of one association over all the rest. The State, recognizing the sovereign right of its federal units in their own spheres, could then turn its full attention to its negative function of the maintenance of legal order and its positive function of the harmonious development of the whole.

Both Bähr and Gneist, whose conceptions of the *Rechtsstaat* have been discussed above, were likewise insistent upon the recognition of a society which could in no wise be swept completely under the rubric of the State. For the former, as for Ahrens, the State was only the most important of associations, its law being merely the supreme and most highly

<sup>75</sup> *Naturrecht*, 6th ed., 1870, pp. 304-305. First published in Paris, 1839, under the title of *Cours de droit naturel*.

developed form of the association-law (*Genossenschaftsrecht*) common to every organized social group. In Gneist's view the State is the unifying force which saves an acquisitive society from disruption through the eternal struggle of its conflicting elements: the State, as the representative of the permanent general interest in opposition to immediate particular interests, is, Gneist held, as firmly grounded in the ethical nature of man as is society, the battleground of possessive instincts, in his covetous material nature. But every social group or class as such is striving to gain possession of the power of the State in order to turn it to its own ends, and the constitution of every State necessarily bears the impress of the dominant social class. The instrument for the rescue of the State from society Gneist believed to be the monarch, whose impartial elevation above the social turmoil makes it possible for him to demand the subordination of the particular to the general interest.

Robert von Mohl, who acted as contemporary historian of the new trend,<sup>76</sup> was also a strong believer in the efficacy of the concept of society as the tool wherewith to rebuild political and social institutions to fit the changing modern world. The State represented to Mohl, much as it did to Gneist, the thought of unity in the minds of any given people, which could never be totally absent no matter how great the multiplicity of groups, associations, and estates, all of which taken together as one complex whole he saw as society. That it is impossible to dissolve all these social organizations and

<sup>76</sup> See his "Gesellschaftswissenschaft und Staatswissenschaft," *Zeitschrift für die gesammte Staatswissenschaft*, 7 Bd., 1851, and *Die Geschichte und Literatur der Staatswissenschaften*, especially I, 72-88. In the first part of his career Mohl rendered valuable juristic service, first, in writing *Das Bundesstaatsrecht der Vereinigten Staaten von Nordamerika*, 1824—a work which too far preceded the later German absorption in federalism to secure the attention it deserved—and, second, in breaking a lance for the coming juristic method in his analysis of the juristic realities of Württemberg; *Das Staatsrecht des Königreichs Württemberg*, 1829-1831. His critic E. Meier in the *Zeitschrift für die gesammte Staatswissenschaften*, 1878, says that this work "zum ersten mal in alle Ecken des wirklichen Staates hineinleuchtet." Cf. Stintzing and Landsberg, *Geschichte der deutschen Rechtswissenschaft*, III Abth., II Halbband, pp. 405-406.



institutions into the State was proved for Mohl by the fact that although even the greatest empire might be shattered about their heads, they often survived with only a slight surface disturbance of their inner lives. Furthermore, in his own day the effects of the Industrial Revolution were just beginning to become apparent. The new industrial network that was gradually transforming the medieval principalities of the previous century into the unified Empire of 1871 was bringing with it a host of new associations, groups, organizations, which Mohl felt to be "entirely independent of the form of the State, and so far only wholly externally controllable by the laws of the State."<sup>77</sup> All these social relationships represented to Mohl real and vital interests; interests which, in fact, might so absorb the individual for the time being as to make him forgetful of the higher duties imposed upon him by humanity and the ethical life. On the other hand, however, the State might be regarded, Mohl held, as all-inclusive inasmuch as its essential purpose of unity must contain within it all the particular ends of other associations within its territorial boundaries. The sphere of activity of the State he left to be determined by the State itself alone: its range of control is as wide as it believes possible and necessary for the maintenance of unity. But what the State does not claim remains the independent and underived right of the particular associations, and is in no way to be regarded as the gift or loan of the State. For the jurists of the future Mohl set the task of inserting between public and private law a new category dealing with the relations of both State and individual to this multiplicity of social organizations.

The writer who did most to promote this school of thought in Germany was the above-mentioned Lorenz von Stein, whose *Socialism and Communism in Present-day France*<sup>78</sup> followed three years after Ahrens' *Cours de droit naturel*. Although he himself had matured in the Hegelian dialectic, Stein, in introducing to Germany the social thought of such

<sup>77</sup> *Die Geschichte und Literatur der Staatswissenschaften*, p. 96.

<sup>78</sup> *Das Socialismus und Communismus des heutigen Frankreichs*, 1842.

men as Saint-Simon, Fourier, and Proudhon, led the way back from the more mystic flights of metaphysics into the firmer paths of actual social facts and conditions.

It is indicative of the new standpoint that virtually the whole first half of his *System of Political Science* is devoted to a discussion of economics, while State and Society as such do not enter until the second volume.<sup>79</sup> Society for Stein, much as for Hegel, was the organism whose purpose is the highest development of each individual contained in it: without a community of men there could be neither material nor spiritual development, and yet it is of the essence of society, he argued, that its members use its advantages as a means for their own ends, not for those of the whole. Thus society eternally wavers between the moments of unity and disruption—a conception which Gneist, as has been seen, borrowed from Stein. The question which troubled Stein, and to which he gave a double answer, was as to how the necessary unifying and synthetic power of the State was to be evolved from a society in which each member was seeking his own good at the expense of his fellows. Following Hegel, Stein postulated an ideal State which stood above and apart from the factions of society and enforced the just claims of peace and unity; transcending its members, this State must be an organism, a person, with its cause and end within itself.<sup>80</sup> It is the unity of man elevated to independent and autonomous personality, receiving its concrete embodiment in the person of the king.

Stein realized, however, that, admirable as this State might be as an ideal, the real State was inextricably involved with Society. Here he went beyond Hegel and formed, as has been said, the bridge between Hegel and Marx,<sup>81</sup> in admitting that the real State was virtually powerless against the

<sup>79</sup> *System der Staatswissenschaft*: I Bd., *System der Statistik*, 1852; II Bd., *Die Gesellschaftslehre*, 1856.

<sup>80</sup> *System*, II, 32. Paul Vogel, *Hegels Gesellschaftsbegriff*, 1925, p. 199, rightly remarks, however, that "Hegels Hauptinteresse richtet sich auf den Staat, Steins Hauptinteresse wendet sich der Gesellschaft zu."

<sup>81</sup> Vogel, *op. cit.*, p. 199.

ruling class; that, in fact, the power of the State was the power of that class, and that the instruments of the State were used for the suppression of the ruled classes. He clung, however, to the ideal of the *Frcistaat*, standing above society, as opposed to the State in which popular sovereignty gave the leading reins into the hands of society. In practice he conceived the State as fulfilling its function in exact proportion to the independence of the monarch and his official servants from the pressure of a self-seeking society.<sup>82</sup>

In all of these theories of the relation between State and society, the unity and ultimate supremacy of the State was conceded, even though the State was often reduced to the upholding of law and of the balance of power between its several social elements. It remained for the Communist doctrines of Marx and Engels to degrade the State, carrying further the ideas of Stein, into a mere tool of society, a tool to be discarded when the revolution had abolished the classes whose oppressive instincts the State served. If Stein and Gneist had seen in every constitution the expression of the interests of the dominant social class, the *Communist Manifesto* of 1848 proclaimed that "the modern State is but an executive committee for administering the affairs of the whole bourgeois class." Although it is impossible to give any systematic statement to the Marxian political theory—apart, of course, from the historical materialism which saw all political power as derived from economic supremacy and changing both in form and content as the instruments of production changed—it is clear that he conceived the State as only a passing phenomenon, which, after it had served the purpose of the proletarian dictatorship, would "die off." As to what was to replace it neither Marx nor Engels was very certain: they held out bright prospects of a future from which repression had vanished to give way to the free asso-

<sup>82</sup> That the significance of the pluralist view for the theory of sovereignty was not lost upon contemporary observers is evidenced by the attack upon it of Bluntschli who protested that the result of the theory would be the radical disintegration of the unity of the State, the shattering of its authority and majesty, and the crippling of its welfare, "Über die neuen Begründungen der Gesellschaft," *Kritische überschau*, 3 Bd., 1855.

ciation of the workers of the world; but as to the precise forms of that new world they preserved a wise reticence.<sup>88</sup>

<sup>88</sup> Oswald Spengler's comment, *Preussentum und Sozialismus*, 1920, p. 79, is significant in several respects: Hegel "stellt als Preusse aus geistiger Wahlverwandtschaft den Staat mit derselben Sicherheit in den Mittelpunkt seiner sehr tief, beinahe goetisch gefassten Entwicklung, wie Marx als Wahrlgländer die Wirtschaft in den Mittelpunkt seiner mechanisch-darwinistischen 'Evolution.' . . . Der Staat ist bei Hegel der Geschichtsbildner, Politik ist Geschichte. . . . Marx aber denkt die Geschichte ohne Staat, Geschichte als Arena von Parteien, Geschichte als Widerstreit wirtschaftliche Privatinteressen."

## CHAPTER II

### THE GERMAN EMPIRE AND ITS JURISTS

THE appearance of the Imperial German Constitution of 1871 marked the definitive beginning of a new school of jurisprudence in Germany. The era of natural law which preceded the French Revolution found its antithesis in the era of positive law which followed the founding of the North German Confederation and the proclamation of the Empire five years later. Kant, Hegel, Savigny, Stahl, and Bluntschli may be taken as representative figures of the juristic thought of the first two-thirds of the century; after 1871 they were replaced by a new school, at the head of which stood Paul Laband, at once the most able and the most rigid exponent of its principles.

The growth of this new school may be attributed to three chief factors. In the first place the political situation itself was such as to inspire a breach with the immediate past. Bismarck had transformed Germany with his *Realpolitik*, his *Machtpolitik*: the jurists followed in his footsteps and turned their backs upon the abstract theoretical discussions which had been swept aside by a more imperative reality. As Bismarck had put an end to romanticism in politics, so the jurists attempted to put an end to it in jurisprudence. It was not the patient thinkers of 1848 who had welded the German nation into a single powerful whole, humbling the "hereditary enemy" on the battlefield as they went, but the man who excluded principles on principle and had no scorn greater than that for the "green table." It was natural that in such an atmosphere the jurists should abandon idealistic speculation and set themselves the task of mastering the juristic nature of the new realm that Bismarck had created for them. Romanticism and idealism were forced to give way to a new and vital realism.

A second factor which gave impetus to this movement

toward a new jurisprudence was the gradual disintegration into several different and increasingly distinct branches of what had up till then been a single science. Whether under the guise of *allgemeine Staatslehre* or *Politik*, the study of the State had been regarded as essentially a single discipline, including political theory, law, and sociology. It has been indicated above how the concept of society gradually severed itself from the concept of the State in the nineteenth century. For Hegel society was a dialectical moment in the transition from the individual to the State; for Lorenz von Stein it had taken on the character of something substantially existing in itself, and even coming to dominate the State; for the successors of Stein in the field of sociology society was the primary reality while the State might be regarded as only one of its manifestations. As a result of this methodological advance it became possible for jurisprudence more narrowly to limit itself to its own proper sphere.

Furthermore, neither the historical nor the philosophical school seemed able to cast much light on the present problems with which the jurist was confronted. The abstract speculations of the latter left the existing world of law as tangled and unsystematic as before, while the former, despite their search for origins and developments, were little concerned with legal forms and institutions as they operated in present fact. In the period immediately following the Restoration a theory which stressed the historical continuity of law might seem to answer the needs of a community still so closely bound, superficially at least, to its past, but in the last half of the century there could be no doubt that a new world was maturing, rooted, indeed, in the past, yet developing unmistakably new forms. There was obvious need for a theory which would allow a systematic juristic survey, analysis, and construction of the law that was actually in effect.

This theory—the third factor in bringing the new juristic school to birth—was supplied by the work of Carl Friedrich von Gerber, who was the first to succeed in giving systematic juristic statement to a legal order that had outgrown the forms and institutions of its past. The mere statement of the

existing legal order, as contrasted with that which it superseded, was not enough to satisfy Gerber; he saw, rather, "a pressing necessity for the erection of a scientific system in which the individual forms exhibit themselves as the development of a unitary basic idea." The new jurisprudence was to be a far more rigid one than any that had gone before it. From it were to be excluded all elements that could not be fitted into the concepts of public law in their development from the basic idea. Foreign matter, such as politics or political theory, or private law concepts and methods, was to be wholly banned from the new *Staatsrechtswissenschaft*. The purpose of the new school was to be the conceptual ordering of the valid public law of the particular State.

The new school broke with the jurisprudence of the past in order to be able to come closer to the existing reality; unfortunately the method which its followers adopted tended to lead them always toward a *Begriffsrealismus*. Seeking reality, they erred all too often into the "Heaven of Concepts" of which Ihering gave so graphic a description. Once the appropriate concept had been created and stamped with approval, it was only with the gravest difficulty that they could be persuaded to abandon it in order to admit new and jarring facts. With a few notable exceptions they attempted

<sup>1</sup> *Grundzüge eines Systems des deutschen Staatsrechts*, 1865, p. viii. The preface here, as in his earlier *System des deutschen Privatrechts*, 1848-1849, is highly valuable as setting out a program for the new school. In the latter particularly he stresses the need for the analysis and construction of the purely juristic elements of legal institutions. In opposition to the methods of the historical school he here demands a juristic method which "die Rechtssätze mit dem Rechtsbewusstsein der Gegenwart, mit unserem eigenen juristischen Denken in Verbindung setzt"; *Privatrecht*, 2d ed., 1850, pp. xxiii-xxiv. His success in achieving his end is witnessed by the repeated references to him as the father of the modern German *Staatsrechtswissenschaft*; Stintzing and Landsberg, *Geschichte der deutschen Rechtswissenschaft*, 1910, III, II, pp. 826-833; Philipp Zorn, "Die Entwicklung der Staatsrechtswissenschaft seit 1866," *Jahrbuch des öffentlichen Rechts der Gegenwart*, 1907, I, 52 f.; Kurt Wolzendorf, *Geist des Staatsrechts*, 1920, pp. 44-45; Jellinek, *Das Recht des modernen Staates*, 2d ed., 1905, p. 62; "Am schärfsten bezeichnen wohl Gerbers 'Grundzüge' der Übergang von der allgemeinen Staatslehre zum neu-deutschrechtlichen Positivismus, der mit Laband seine fast ausschliessliche Alleinherrschaft antrat"; Hugo Preuss, "Ein Zukunftsstaatsrecht," *Arch. für öffentliches Recht*, 18 Bd., 1903, p. 374.

less to grasp the essence of the new as it was in itself, than to prove that the new could be fitted into the accepted categories, not infrequently taken over bodily from the past. What could not be fitted in was discarded as irrelevant or nonexistent: as Gierke said, what could not be defined, did not exist for them. "If," again to quote Gierke, "the flood of life in countless places pours over the artificial dams which the System has erected to hold it in, the fault lies with the facts and not with the System."<sup>2</sup>

And, indeed, there cannot be said to have been any general agreement on any other point than that the System itself must be preserved at however great a cost. Although the particular results of the System as derived by its many adherents from an analysis of the same set of facts were in radical opposition to each other with virtually no possibility of mutual agreement, still the System itself remained for the most part unquestioned. Where one thinker with indisputable logic could demonstrate that the sovereignty of the Reich lay solely in the Reich itself while the several States had been reduced to mere autonomous provinces, another with equal logic could establish that the central government was no more than the servant of the absolutely sovereign States by which it had been created. A third maintained that sovereignty was not to be found in either of the two alone, but only in an ideal unity made up of both. Granted the pre-suppositions, the logic in almost every case was irrefutable;

<sup>2</sup> "Die Grundbegriffe des Staatsrechts," *Zeitschrift für die gesamte Staatswissenschaft*, 30 Bd., 1874, p. 154. Cf. also Ihering's "Im juristischen Begriffshimmel" in *Scherz und Ernst in der Jurisprudenz*, 1885. "Die zivilrechtliche Jurisprudenz," comments Zorn, *op. cit.*, pp. 66-67, "arbeitet mit scharfkantigen Begriffen und hat einfach den Tatbestand unter diese Begriffe zu stellen; je schärfer, so nimmt man an, diese logische Operation durchgeführt wird, desto besser ist der Jurist. *Fiat justitia, pereat mundus*. Ohne jede Rücksicht sachlicher Art, ohne jeden Seitenblick auf andere Dinge vollzieht der Jurist seine formelle Denkaufgabe, deren Resultat für ihn und für die Welt als Urteil hervortritt." (Laband called his method "die zivilistische.") Zorn suggests that the later *freies Recht* movement, with its plea for the freeing of the judiciary from entire subordination to juristic logic, resulted in part from the overdevelopment of the *Zivilistik*; "Viel gefährlicher aber noch als auf dem Boden des Zivilrechtes ist diese Methode auf dem Gebiete des ganzen öffentlichen Rechtes. Das Prinzip *fiat justitia, pereat mundus* kann das Tod des Staatsrechtes sein."



and it was exactly the presuppositions which were held, because of the pure conceptual air they breathed, to be unquestionable. Destroy the presuppositions, suggest that a concept of sovereignty derived from the French absolutism of centuries before was not applicable to a constitutional German federation, and the admirable logical superstructure comes hurtling down through empty space. But such suggestions went unheeded.

"The jurists," remarks Duguit scornfully with particular reference to the German school of this period, "live in a world peculiar to them, in a sphere inaccessible to the profane; the exterior world is nothing; the jurists know only the world of the jurists."<sup>3</sup> In this strange formalistic world it was the concept of sovereignty in its several aspects which played the principal rôle.

#### THE STATE AS SOVEREIGN PERSON

A new juristic formulation of this concept—or, rather, a readjustment of its position in the political scheme—had become essential since the State had ceased to be a private relationship between rulers and ruled and had become primarily a public one. In his treatment of the place of sovereignty in the modern State, Gerber exercised as great an influence in Germany as he did in setting out and practicing the method which the new jurisprudence should follow.

As the "basic idea" of his reconstruction of public law in terms both of its own necessary concepts and of the modern State, Gerber put forward the personality of the State, a personality not analogous to or derived from that of private law but unique and original in public law.<sup>4</sup> This conception,

<sup>3</sup> *L'État*, 1901, I, 241. Cf. Joseph Barthélemy, *Les Institutions politiques de l'Allemagne contemporaine*, 1915, who makes a bitter and detailed attack on the German political system and its jurists.

<sup>4</sup> *Grundzüge*, p. 2, note 1. "Die Auffassung des Staates als eines persönlichen Wesens ist die Voraussetzung jeder juristischen Konstruktion des Staatsrechts." See also Gerber's *Über öffentliche Rechte*, 1852; a more tentative work. For the best American statement of "The Juristic Conception of the State," see W. W. Willoughby, *American Political Science Review*, vol. XII, 1918, pp. 198-208; also his *The Fundamental Concepts of Public Law*, 1924.

it has been shown, was one which was common after Hegel, but there were few who grasped it more deeply than as a pleasantly philosophic phrase wherewith to introduce the actual possession of sovereignty by the monarch. Too great an effort of mind was required, no doubt, in the reactionary Germany of the first half of the century to realize that the monarch was no longer sovereign in his own right, but was being absorbed into a greater whole of which he was only a single, if predominant, organ.

The first to state this truth in such a way as to bring it home to the jurists was Wilhelm Eduard Albrecht, to whom Gerber dedicated his *Grundzüge*. In a review in 1837 of a work by Maurenbrecher denying the personality of the State and asserting the sovereignty of the monarch, Albrecht, it seems, almost by chance, discoursed at some length upon the necessity for establishing the concept of the State-person in the very center of public law. The breach between the old and the new view of the State, he argued, consists "in nothing less than in an essentially different fundamental idea of the juridical nature of the State." In place of a private law State, there has now developed a public law State. Today, Albrecht continued, we think of "the State not as an association of men which is designed solely and immediately for the individual ends and interests of those men, be they all or many, or even individuals, notably the ruler; but as a Commonwealth, as an institution, standing above individuals, which is dedicated to ends which are by no means merely the sum of the individual interests of the ruler and his subjects, but constitute a higher general collective interest."<sup>5</sup>

This statement was taken over virtually intact by Gerber,

<sup>5</sup> *Göttingische gelehrte Anzeigen*, 1837, III, 1491-1492. Hermann Heller, *Hegel und der nationale Machtstaatsgedanke in Deutschland*, 1921, pp. 166-167, concedes that "als Schöpfer der modernen publizistischen Persönlichkeitstheorie gilt heute unbestritten der Jurist Albrecht," but denies that he did more than go back to Hegel. There can be little doubt that Albrecht is chiefly important because of the use which Gerber made of his suggestions; Stintzing and Landsberg, *op. cit.*, III, II, 327. Gerber was also in part indebted to Joseph von Held: the State is "das vernunft- und natur-nothwendige souveräne, ewige Gemeinwesen," *System des Verfassungsrechts der monarchischen Staaten Deutschlands*, 1856, I, 3.

and from the publication of the *Grundzüge* retained almost unquestioned predominance in Germany. To the conception of the State as Person, Gerber made a significant addition or, at the least, made explicit something only hinted at by Albrecht. In the State, according to Gerber, the people achieve legal personality, indeed the highest personality known to the law; they are lifted to a common legal consciousness and achieve the power to will. Private law, and here also Gerber was an innovator, is a system of will-possibilities (*Willensmöglichkeiten*), linked to the individual power to will: "public law, too, is a system of will-possibilities, but linked to the power, clothed with personality, of the politically united people."<sup>6</sup> The one distinctive feature of this power to will of the State, Gerber insisted, is that it is "the power to rule": no other person than the State, save perhaps the church, could claim to have this power to rule as the content of its will. The person of the State, then, is at the heart of all public law; but that which distinguishes the State from all other persons is that the specific substance of its will is rulership. Here appears the full-blown juristic counterpart of the political doctrine that the State is primarily and essentially power. "The State's power to will, political power, is the law of the State," wrote Gerber.<sup>7</sup>

Sovereignty, Gerber held, was only an attribute of the power of the State, but was by no means identical with it. Indeed, in his version, to say that the *Staatsgewalt* was sov-

<sup>6</sup> *Grundzüge*, p. 4, note 2. The legal will of the State "ist das Herrschen, d.h. rechtliches Handeln im Interesse des Staatszweckes mit einer das ganze Volk verpflichtenden Wirkung."

<sup>7</sup> *Grundzüge*, p. 3. "Die Willensmacht des Staates, die Staatsgewalt, ist das Recht des Staates." The comment of Preuss, *Gemeinde, Staat, Reich als Gebietskörperschaften*, 1889, p. 235, on this phrase is worth quoting in full: "Die im deutschen Staatsrecht heute herrschende Theorie von der Persönlichkeit des Staates hat ihren Ursprung in einer wissenschaftlichen Reaktion gegen Maurenbrechers rückhaltlose Kanonisierung einer unfehlbaren, heiligen, und ewigen Staatsgewalt, die der Monarch als sein wohl erworbenes göttliches Recht besitzt. Bei dem Stammvater der heute herrschende Theorie, Gerber, ist zwar vor die konkrete Individualperson des Monarchen das Quasi-Individual der abstrakten Staatspersönlichkeit getreten, aber die Kanonisierung der Staatsgewalt, ihre Identifizierung mit dem Staate bleibt die gleiche." Cf. Hugo Krabbe, *Die Lehre der Rechtssouveränität*, 1906, p. 2.

ereign was only to say that it was independent of any external higher *Staatsgewalt*, a theory which Laband also accepted and carried on. Furthermore, Gerber did not see the *Staatsgewalt* as an absolute power to will, like that of the individual, but as one free to move only within the limits of the ends which it pursued. Where it transgressed those limits in interesting itself in matters beyond its scope, highest power no longer legally stood at its disposal;<sup>8</sup> but, to be sure, it was the State-person itself which formally determined the ends which it should pursue.

With good wisdom Gerber denied that the concept of sovereignty had any connection with the position of the monarch. He made the concession to Maurenbrecher and Zöpfl of admitting that the *Staatsgewalt* does not appear as an abstract force, but usually in the rights of the ruler. Further he admitted that, in Germany at least, the rights of the monarch usually included all branches of the *Staatsgewalt*, and that "thus the monarch formally absorbs (*aufnimmt*) the personality of the State into his own personality." But still he maintained that the State was a real being, resting on the natural foundation of the people and possessed of a real, not a fictitious, will: "this power to will is something existing in and for itself, is a reality."<sup>9</sup>

The monarch, Gerber held, is the embodiment of the abstract personality of the *Staatsgewalt*, and the highest will-organ of the State. The right of the monarch is the right of being an organ of the State, and hence presupposes the existence of the State. The German view of monarchy, according to him, is that the royal will, under certain conditions, should be accepted as the general will, the will of the State: "the representation of the State's will in the will of the monarch extends over the whole and undivided sphere of the *Staatsgewalt*. What, therefore, the *Staatsgewalt* itself is potentially capable of legally, is also the content of the right to will of the monarch."<sup>10</sup>

But this all-embracing right of the monarch, Gerber con-

<sup>8</sup> *Grundzüge*, p. 29.

<sup>9</sup> *Ibid.*, p. 19, note 1.

<sup>10</sup> *Ibid.*, p. 72.

tinues, is not the free right of an individual to will as he chooses, but is bound by the institutional character of monarchy, as defined in the constitution of the particular State. Speaking of the generally accepted constitutional principles of the German States of his own day, Gerber pointed out that the State required another organ beside the monarch to ensure that the latter's will should really be the will of the State, and not merely an arbitrary individual will. To guarantee the legality of the government and "to bring the moral convictions of the people to direct and effective expression," the coöperation of the diet or estates (*Landstände*) with the monarch was necessary. The function of these diets and their place in the general political scheme, Gerber defined in the usual German manner: "their task is not to rule, but to act as a limitation upon the ruling will of the monarch, so that the latter only achieves legal existence, when it has, where required by the constitution, absorbed into itself the will of the estates."<sup>11</sup> In conjunction with this theory, the dogma of the almost exclusive importance of the sanction in legislation was also put forward. Since the monarch was conceived as being the primary and essential organ of the State, while the *Landstände* were only subsidiary to him, it was necessary that the monarch's share in legislation be duly emphasized. This was achieved by Gerber—and his followers developed the doctrine further—by means of holding the determination of the content of law as a formally insignificant function, and the application of the sanction as the truly decisive moment in legislation.<sup>12</sup> In other words, the ingenious devices of formalistic construction were called upon to restore to the monarch that sole supremacy which he had lost in passing from absolutism to constitutionalism.

The significance of this piece of juristic construction was nicely caught by Bruno Schmidt, who remarked that the monarch whose sanction is merely the final condition of the complete legislative process can as justly claim to say "I will

<sup>11</sup> *Grundzüge*, p. 119. This view, stated, it will be remembered, by Stahl, was almost universally accepted in Germany as the proper "construction" of constitutional monarchy.

<sup>12</sup> *Ibid.*, p. 142.

and create the law," as a man can claim to have lifted a hundredweight when he has merely pressed down one side of a balance which has a hundredweight in either pan, and so has lifted the other side.<sup>13</sup>

Gerber's method and conclusions have been discussed at considerable length since they so very largely dominated German jurisprudence in the period after the founding of the Empire. Indeed, until the rise of a new philosophical movement at the beginning of the present century, Gerber's influence was unquestionably predominant in German political jurisprudence.<sup>14</sup> New factors were introduced—notably the vexed question of Statehood and sovereignty in federalism—with which Gerber had not concerned himself, but broadly speaking the rest of the century was occupied in refining and making practical application of the principles which Gerber had laid down.

Paul Laband's *Public Law of the German Empire*<sup>15</sup> is undoubtedly the finest and most characteristic achievement of this positivistic political jurisprudence for which Gerber had prepared the way. Except for the concern with the problems of federalism it is essentially the application of Gerber's concepts to the new Imperial Constitution. Little of theoretical import is either added or taken away. In this work both the merits and the defects of the new method are clearly visible. It is founded in the first place on the theory that the jurist oversteps his bounds in attempting anything in the nature of an *allgemeines Staatsrecht*: positive law is by its nature limited to the individual State, save where there

<sup>13</sup> *Der Staat*, 1896, p. 89.

<sup>14</sup> Stintzing and Landsberg, *op. cit.*, p. 833, for example, see Laband, "als der geistige Testamentsvollstrecker Gerbers für das Staatsrecht des deutschen Reiches."

<sup>15</sup> *Das Staatsrecht des deutschen Reiches*. First edition, 3 vols., 1876-1882; fifth and final edition, 4 vols., 1911-1914. All references below are to the fifth edition. He also published a shorter "Deutsches Reichstaatsrecht" which appeared first in 1884 in the *Handbuch des öffentlichen Rechts der Gegenwart*. Numerous articles and reviews by him appeared in the *Archiv für öffentliches Recht*, which he founded in 1886 with P. Stoerk, and elsewhere. See especially "Zur Lehre vom Budgetrecht" in the first number of the *Archiv*, and "Die geschichtliche Entwicklung der Reichsverfassung seit der Reichsgründung," *Jahrbuch des öffentlichen Rechts der Gegenwart*, I Bd., 1907.

is an accidental "reception" or duplication of the law of one State by another, and the jurist *qua* jurist has no concern with anything other than positive law. Secondly, it limits the jurist, even in his own *Staatsrecht*, to the formal conceptual aspect of the law with which he is dealing. To the logical completeness of such a work as Laband's no exception can be taken: once the world in which it moves has been entered there is no escape from the logic with which it advances from point to point, and yet when one has followed it through to its conclusion there seems still an entire world of political and social reality beyond it of which it takes no cognizance. In brief, it was not, according to Laband, for the jurist to reason why, but merely to accept the forms of the given and build up a conceptual construction of it.

In accord with the new, but by this time orthodox, tradition, Laband unhesitatingly accepted the State as the sovereign person clothed with legally absolute rights over all its members, and as the source from which all public powers were derived; although, as will be seen later in relation to federalism, he did not hold sovereignty to be a necessary condition for Statehood. This doctrine of the sovereign State-person won almost universal agreement after Gerber: it was combated by only two writers of any considerable importance. The first to attack it in the new era was Max von Seydel, who discarded the concept of the juristic personality of the State and made sovereignty the personal attribute of the ruler. From a far different angle, Preuss later denied the validity of the classic concept of sovereignty in relation to the modern State.

As a result, however, of the limitations imposed both by the constitutional and the federal systems of political organization, the process of paring away the positive substantial elements of sovereignty had already begun. For Laband it was essentially a negative conception, determining not what powers were or might be exercised by the State, but merely expressing the fact that no higher power stood above the State authorized to issue legally binding commands to it. A negative conception such as this must, however, have its positive correlate. This was found in some modification or

adaptation of the famous *Kompetenz-Kompetenz* theory which figured so prominently in German juristic thought: since, formally, the State could be bound by no power higher than itself, it must possess the ultimate and absolute right to determine its own competence or jurisdiction.

Gerber had said that sovereignty had only external and not internal reference: this doctrine was taken over and strengthened by Laband:

"It is precisely in relation to the subjects of the State," Laband wrote in refutation of a contrary theory put forward by Siegfried Bric, "that sovereignty does not come into consideration at all, but only in relation to States; for sovereignty does not state what and whom the *Staatsgewalt* can command, but only that it *needs to obey no one*, that there is no higher power above it: hence it is not directed down, but up. But if sovereignty thus denies any higher power, then it also at once excludes the possibility that the extent and content of the sovereign power can be established with legally binding force by any power outside itself. How far a sovereign power extends its sphere can only depend on its own will, that is, this sphere is theoretically unlimited."<sup>16</sup>

Like the majority of his colleagues, Laband was quite ready to admit that this unlimited right of determination of competence existed only in the formal juristic sphere and that materially the ends which the State set for itself (*i.e.*, the extent of its competence) were essentially determined by the needs and demands of social forces.<sup>17</sup> Still, from the formal legal standpoint he insisted that sovereignty must be regarded as an absolute, illimitable and indivisible, which was possessed by the State either wholly or not at all. The suggestion that sovereignty might be divided—as in the simplest view of federalism—he repudiated as a complete *contradictio in adjecto*: any diminution of power, he argued, legally imposed upon a sovereign from without takes from it absolutely the property of sovereignty. In answer to an attack made by Preuss upon the implied absolutism of this theory, Laband explained that in so far as sovereignty was

<sup>16</sup> *Archiv für öffentliches Recht*, II, 1887, p. 316. Cf. *Staatsrecht*, I, 72-78.

<sup>17</sup> *Archiv für öffentliches Recht*, II, 1887, p. 318.



taken by its opponents to mean "the limitless power of the absolute State," they were fighting against windmills. "All are agreed," he continued, "that such a power is not only not essential to the modern conception of the State, but above all that it cannot be realized."<sup>18</sup>

Although this disavowal is sufficient to take away the sting of the accusation that most of the German doctrines of public law were "mere apologies for the use of force; and that under the cover of judicial theories they had for their object only the reestablishment of the absolutism of the State,"<sup>19</sup> it remains no less difficult to discern why juristic theory should thus avowedly ignore the modern conception of the State, and parade in the formal dress of concepts long since outworn. The fact of sovereignty had changed, but there was a pathetic eagerness to prove that the old concept still could be made to fit. Only by remembering with Gierke that the fault lies in the facts, not in the concepts, is it possible to understand the necessity, not of fitting the traveler to the bed, although that too was frequently done, but of having one bed in which he sleeps in theory, another in which he sleeps in fact.

### THE THEORY OF AUTO-LIMITATION

Next in rank to Laband among the jurists of the period after 1871 was Georg Jellinek, an Austrian, the major part of whose life was spent in the German universities. Unlike Laband, however, whose fame rests almost solely upon his great work on the German Constitution, Jellinek wandered far afield, his work culminating in his *Allgemeine Staatslehre*,<sup>20</sup> which summed up and gave systematic expression to the wide range of conclusions which he had developed in

<sup>18</sup> *Staatsrecht*, I, p. 74, note 1.

<sup>19</sup> Duguit, "The Law and the State," 81 *Harvard Law Review*, 1.

<sup>20</sup> First published as *Das Recht des modernen Staates*, 1900, which was to be the first volume of the *Allgemeine Staatslehre*. The second volume never appeared independently, although parts of it undoubtedly found their way into the enlarged later editions of the above work, and other parts were published by his son, Walter Jellinek, in the posthumous *Ausgewählte Schriften und Reden*, 1911. The third edition of the *Allgemeine Staatslehre*, edited by his son in 1914, has been used here.

his earlier writings. The scope of Jellinek's work makes it almost impossible to give any just presentation of it in the small space that is available here. Always less narrowly juristic than Laband, he ventured, especially in his later works, into many fields apart from jurisprudence proper, such as sociology and social psychology: fields which he readily admitted to be "meta-juristic." But, as jurist, he was a thoroughgoing disciple of the juristic method as presented by Gerber, and was unafraid to follow his logical constructions wherever they might lead him. It is chiefly in his juristic capacity that he has been considered below.

Jellinek's chief contribution, perhaps, to the development of German political jurisprudence was the explicit formulation of the conception of auto-limitation. This doctrine, implicit in so much of the writing of the time and indeed in the theory of *Kompetenz-Kompetenz* itself, was based on the restriction of the omnipotent will of the State by itself in order that the sway of law might be extended to its utmost possible limits. It was intended not only to explain the difficulties residing in the constitutional and federal limitations imposed upon the modern State, but to lay as well the theoretical foundations of the *Rechtsstaat*.

The rudiments of a similar conception had been worked out before Jellinek by the great jurist Ihering, but while it had played only a small part in Ihering's general thesis that the law and its institutions were explicable in the last analysis only in terms of the social purpose which they were erected to serve, it became for Jellinek the center from which all his other theories radiated. Ihering conceived the State as being in essence the possessor of the regulated and disciplined coercive power which, growing out of unorganized society, made possible the common realization of social and individual ends. The State in his view took over the interests of society one by one, making them its own, and he ventured the prediction that at the end of things it would have absorbed them all.<sup>21</sup> In order that the State might fulfil its

<sup>21</sup> *Der Zweck im Recht*, 1877, I, 304-305. Cf. Jellinek: "Die ganze Geschichte der letzten vier Jahrhunderte mit all ihren Wechselfällen bestätigt fortdauernd den Satz des Hobbes, dass der Staat der grosse Leviathan sei,

function of compelling social harmony it must be endowed with sovereignty, a power superior to all others within its borders: the right of coercion he held to be an absolute monopoly of the State. This power becomes law (*Recht*) as it gradually takes on a normative character.<sup>22</sup> Thus the problem that faced the State in the course of its development was ensuring "the appearance of law by means of auto-limitation of power."<sup>23</sup> The progressive solution of this problem, according to Ihering, passed through three phases: first, that of the bare single command; second, that of rules or norms one-sidedly binding on the subjects of the State; and ultimately, that of the *Rechtsstaat*, in which the State, in its own interests and for the better attainment of its ends, accepts as binding upon itself the norms which it has laid down for its subjects.

It was with the third of these phases that Jellinek was primarily concerned. The possibility of auto-limitation of power he acclaimed as the answer to all the puzzling questions presented by the modern State. In essence the problem which he faced was this: Sovereignty resides in the State; the State is therefore clothed with supreme and absolute power; but in the modern State this power is in fact strictly limited by the constitution and the laws of the State and, to a less degree, by the State's membership in the international community of States. The theory of the absolute sovereignty of the State, which is undeniable and necessary, is countered by the fact of the equally necessary and undeniable limitation of the State: how is it that this can be possible? Obviously, answered Jellinek, only by means of a self-imposed limitation of its power, since by definition there can be no power above the State. With Ihering he laid it down as axiomatic that "a power to rule becomes legal by being limited. Law is legally limited power. The potential power of the ruling commonwealth (*Gemeinwesen*) is greater than

der alles ursprüngliche Herrschaftsrecht der ihm Eingegliederten verschlungen habe"; *System der subjektiven öffentlichen Rechte*, 1892, p. 274.

<sup>22</sup> Compare, Jellinek's theory of the "normative Kraft des Faktischen," *Allgemeine Staatslehre*, pp. 337 ff.

<sup>23</sup> *Der Zweck im Recht*, I, 322.

its actual power. Through auto-limitation it achieves the character of legal power."<sup>24</sup>

It is easy to regard this theory as complementary to that of *Kompetenz-Kompetenz*, and the two together afford an admirable clue to the temper of the contemporary discussion of the concept of sovereignty. The theory of *Kompetenz-Kompetenz*, derived primarily from the study of federalism, laid it down that the sovereign was formally unrestricted in the choice of its paths of activity; the theory of *Selbstbeschränkung*, on the other hand, explained the inner processes by which certain spheres and modes of activity might be excluded from the sovereign's competence. Laband made sovereignty rest upon the negative attribute of freedom from any legally superior power, which, taken positively, involved the freedom of the State to select its own ways and means for itself. Jellinek found sovereignty to lie in the exclusive right of legal self-determination and legal self-obligation. This implied, positively, "the exclusive capacity of the *Staatsgewalt* to give its ruling will a universally binding content, to determine its own legal order in every direction" and, negatively, "the impossibility of being legally restrained by any other power against its own will, be this power that of a State or not."<sup>25</sup> It is obvious that the positions of Jellinek and Laband are virtually identical. Jellinek's is the more elaborate version, but both are founded on the simple logical argument that since the State is highest, recognizing no superior and outranking all inferiors, it must be formally free to go its own sovereign way. Both agree that sovereignty only lays down the negative condition of formal freedom from a superior power, without in any way indicating the actual content of the State's activity.

<sup>24</sup> *Allgemeine Staatslehre*, p. 386.

<sup>25</sup> *Ibid.*, pp. 481-482. Cf. *Gesetz und Verordnung*, 1887, pp. 196 ff. Compare this definition by Jellinek with that of Laband, *Deutsches Reichstaatsrecht*, 1907, p. 17: "Es ist unbestritten, dass es eine oberste und höchste Gewalt geben muss, die keiner anderen irdischen Gewalt unterworfen ist, die in Wahrheit die *potestas suprema* ist. Das Kriterium der obersten, höchsten Gewalt besteht darin, dass sie nur sich selbst bestimmt und von keiner anderen Gewalt rechtlich verpflichtende Vorschriften empfangen kann."

In one form or another this theory of the right of auto-determination of competence came to be very widely held among the jurists of the period, although the exact form in which it should be stated was a subject of increasing controversy. It was far from uncommon for a writer to set out with the destruction of all preëxisting theories of *Selbstbeschränkung*, and then proceed himself to set up a theory differing only incidentally in phraseology from most of those which he had destroyed.

In this way Heinrich Rosin protested against one of Jellinek's earliest versions of the theory that sovereignty was the exclusive right of the State to incur binding obligations only through its own will<sup>26</sup> (*ausschliessliche Selbstverpflichtbarkeit*). Taking advantage of the assertion by Jellinek that individuals who incurred obligations in private law were in fact being obligated by the will of the State since it was the State which attached legal consequences to the individual's act, Rosin argued that the *causa efficiens* of the obligation was not the State's will but the individual's. Furthermore, he contended, if the binding force of obligations assumed under private law was to be sought in the legal order maintained by the State, then, logically, in the next remove, it must be necessary to make the binding of the State under international law a product of the international legal order; a conclusion which would destroy the exclusive *Selbstverpflichtbarkeit* which Jellinek had set up as his criterion of sovereignty.<sup>27</sup> This criticism was, however, of no great value since the point of Jellinek's argument was not that *only* the State could be legally bound by its own will, but that the State alone could be *exclusively* so bound. In addition, Rosin himself, after discarding Jellinek's proposal, put forward a theory of his own almost identical with Jellinek's general position.

The heart of sovereignty since the time of Bodin, Rosin held to be the legal conception of highest power. Since, he argued, legal power means the determination of the will of

<sup>26</sup> In Jellinek's *Lehre von den Staatenverbindungen*, 1882.

<sup>27</sup> "Souveränität, Staat, Gemeinde, Selbstverwaltung," *Hirths Annalen des deutschen Reiches*, 1883, p. 266.

one personality by another, highest legal power must be the relation between wills in which one will is able in its own right to determine the other. He came thus to the definition of "the positive concept of sovereignty as that legal position of a personality thanks to which it can be legally determined on the basis of existing law by the will of no other personality or, affirmatively expressed, as exclusive auto-determination through its own will."<sup>28</sup> Holding rigidly to the absolute indivisibility and illimitability of sovereignty, he insisted further that any personality subject in any single point to legal determination by a will external to it, was excluded from a claim to sovereignty, unless the basis of the right so to determine its will lay within the affected personality itself. That is, the sovereign State might by treaty submit itself in some particular respect to the decisions or demands of a foreign will without surrendering its sovereignty.

With Laband and Jellinek, Rosin held that the concept of sovereignty stated nothing whatsoever as to the powers actually being exercised at any given time by a particular sovereign, but merely affirmed that the decision as to what powers should be exercised rested with the sovereign State alone.<sup>29</sup>

To escape from the contemporary doctrine of *Kompetenz-Kompetenz*, once the issue of federalism was introduced, was a difficult matter even for such jurists as were not caught in the trammels of the reigning *Begriffsjurisprudenz*. Albert Haenel, for example, one of the best of the jurists of the time, began by overthrowing all the accepted doctrines of *Selbstverpflichtung*, *Selbstbeschränkung*, and *Selbstbestimmung*; but he found himself ultimately obliged to accept the fundamental doctrine from which they all sprang. On the whole, however, his work must be conceded a more permanent interest and significance than that of most of his contemporaries.

<sup>28</sup> *Ibid.*, p. 269. ". . . ausschliessliche Bestimmbarkeit durch eigenen Willen."

<sup>29</sup> This idea, seen from another angle, Rosin expressed nicely in his definition of *Kompetenz-Kompetenz* as "eine potentielle Totalität des Zweckes verbunden mit aktueller Partialität desselben," *op. cit.*, p. 290, a widely quoted phrase.

At the outset Haenel declared against the mode of attack on sovereignty which arrived at its final concept by means of logical juggling with the abstract concepts of "rulership" and "highest"—the method which Rosin avowedly followed. Against both Jellinek and Rosin he argued that it was impossible to set up the State as a Being absolutely severed from all external influences, exclusively determining its own competence and incurring its own obligations. Such a State, he contended, would be an absolute negation of the principle of law which was an essential condition of social life.

The State Haenel defined in almost Aristotelian terms as "the complete and self-sufficient community which contains in itself the instruments of power and law necessary for the maintenance of its existence and effectiveness."<sup>30</sup> Since it is the highest and most inclusive territorial corporation, superior to all other powers within it, and is not only the supreme guardian of law but the central organ for the cultural development of the community as well, it must be endowed with highest rulership. Sovereignty—the attribute which distinguishes the State from all other corporations—is then, according to Haenel, not to be considered as one special feature of the State, but as the expression of its whole nature. The supremacy of the State in this view rests on no abstract concepts, but on the supreme importance and dignity of its ends. "For sovereignty," he wrote, "is not a logical category which only expresses a highest rulership without content, or, which is the same thing, with an arbitrary content, but is *the* highest rulership, which finds its justification and content in those special tasks of the State."<sup>31</sup>

In sharp contrast to Gerber and Laband, Haenel held that sovereignty, since it only indicated a comparison between the State and other social organizations in regard to structure, function, and duties, was exclusively of inner-State reference, and was not an international law concept. That the concept was used in international law signified only, according to him, that the State was the representative in the

<sup>30</sup> *Studien zum deutschen Staatsrechte*, 1873, I, 41; *Deutsches Staatsrecht*, 1892, pp. 108 ff.

<sup>31</sup> *Deutsches Staatsrecht*, p. 220.

international community of the interests of its entire people. Furthermore he contended, contrary to virtually all accepted opinion, that the State could retain its sovereignty even though it were subordinated to another State. In this case, however, he insisted that the relation between the State and its subjects must remain unchanged despite the State's recognition of a superior.<sup>32</sup>

This view of sovereignty was admittedly cut to the pattern of the unitary State. When he turned to the federal State, Haenel found it not altogether easy to reconcile the facts of the situation to the concepts which he had won from a study of the simpler body. Here he no longer found a single State empowered to undertake the supreme guidance and control of society, but a number of different State-like bodies. Without wholly relinquishing his former breadth of view, Haenel found himself forced virtually to identify sovereignty with the power to determine competence, *i.e.*, *Kompetenz-Kompetenz*. If the central State in a federal union had this power, he argued, then it could not be compared to its disadvantage with the sovereign unitary State. Although it was to be conceded that the central State did not actually have all rights, still its power of *Kompetenz-Kompetenz* gave them to it potentially, and the sovereignty of even the unitary State meant only that its sphere of action could be determined by itself, and never "the actual appropriation of all the tasks which are contained as abstract possibilities in the universality of the State's purpose."<sup>33</sup> Thus Haenel, like most of his contemporaries, was betrayed by the concept of sovereignty into belying the nature of the federal State in order to bring it under the concepts of the unitary State.

Haenel's criticism of Jellinek's criterion of sovereignty as the exclusive right of the State to incur obligations through its own will, was valid in that Jellinek tended to overstress the importance of the State in relation to law; but, in statement at least, Jellinek's ultimate position was little removed

<sup>32</sup> *Ibid.*, p. 118; that is, the superior State cannot be empowered to give any orders direct to the subjects of the State subordinated to it.

<sup>33</sup> *Ibid.*, p. 797. A more detailed account of Haenel's view of federalism will be found in Chapter III.



from that of his critic. Haenel insisted that to say that the State is sovereign is not at all to say that it is above the law. On the contrary, since the State is merely one phase of society, and society is founded upon law, the State too is wholly within the law. Sovereignty, far from freeing the State from the law, in Haenel's view only affirms that the State has the duty of supreme leadership in forming and guaranteeing the law both for the other forms of social organization and for itself in accordance with its high purpose. But Jellinek's theory, he contended, left the State free to choose whether or no it should be bound by the law, and he asked whether the nature of the State was not such as to compel it to recognize the binding effect upon it of legal norms. Haenel answered that there could be no doubt that "the State is not obligated through its own will [save as all persons assume obligations through their own will], but through the necessity of law which works with compulsive force upon it."<sup>34</sup>

Despite Haenel's accusation, however, Jellinek accepted much the same view, and made it indeed one of the chief points of his later works. Like Haenel, he contended that while the State was free to decide upon the particular laws by which it was to be bound and limited, and could alter them at will, still, it could not free itself wholly from legal limitation. In other words, Jellinek held the legislative power of the State to be at once above any given law and below law in general. Only within the forms of law and by establishing other limitations upon its power could the State abrogate or alter existing laws. The sovereign power of the State, he wrote, is "not State omnipotence. It is legal power and bound by the law. To be sure, it suffers no legal limits: the State can rid itself of every self-imposed limitation, but only within the forms of law and by creating new limits. Not the individual limit but the fact of limitation is the permanent factor. As little as the absolutely restricted State exists, so little does the State with absolutely boundless sovereignty."<sup>35</sup> The essence of the whole legal system (*Rechtsordnung*), he

<sup>34</sup> *Deutsches Staatsrecht*, p. 117, note 2.

<sup>35</sup> *Allgemeine Staatslehre*, p. 482; cf. pp. 386-387.

maintained, was to be found in the auto-limitation of the State; law, in what he held to be its widest and most satisfactory definition, was the norms adopted by the State as binding upon itself, norms which became law essentially because they were binding on the State itself as well as on its subjects. Law being the condition of life for the modern State, only the "how" and not the "if" of the legal order, according to Jellinek, rested with the State.

### THE SANCTION AND LAW

In this sphere of the relation between law and the State, though again from a different angle, Jellinek's general position led him into conflict with Laband. Where the latter held the binding force of law to depend upon the coercive power of the State, Jellinek regarded the element of coercion as subsidiary. In this controversy, as in general, Laband and Haenel may be taken as occupying respectively the right and left wings, while Jellinek adopts a midway position. According to Laband only the State was endowed with an original right of rulership (*Herrschaft*), only the State was privileged to command free persons to act and to forbear from action, and to compel their obedience to such commands: "When one says 'the State rules,' one has singled out that characteristic without which one cannot conceive the State, and which, on the other hand, distinguishes it from all other subjects of the whole legal system."<sup>86</sup> This being the case, Laband came logically to the conclusion that the legally important element in the law which the State maintained and brought into being must be the command or sanction which the State applied to the given legal prescript. He admitted that it was "not as if the creation or formulation of the content of law were not a concern of the State, indeed a peculiarly important duty of the State: the discovery of the legal rule which is to be sanctioned is also a part of legislation. But the specific activity of the power of the State, its rulership, appears not in the production of the content of

<sup>86</sup> *Archiv für öffentliches Recht*, II, 159. It is scarcely necessary to point out again the closeness of Laband to Gerber.

law, but only in sanctioning the validity of law, in equipping a legal prescript (*Rechtssatz*) with power to bind, with outer authority."<sup>87</sup>

It is interesting to note how closely this theory adhered to the then reigning "construction" of constitutional monarchy which claimed for the monarch the sole power of legislation inasmuch as it was he who gave compulsive authority to laws which he had formulated jointly with the representative assembly.

The most notable among the opponents of this separation of the content of law from the sanction with which it was clothed was Otto von Gierke, whose general position will be considered below. Laband found four conceptually distinct moments in the process of legislation: the fixing of content, the sanction, the promulgation of the law, and its publication. Gierke protested that in fact there were only two: the formation of the will of the State as a collective person, and the expression of that will. "The law-command," he continued, "cannot be torn in formalistic fashion from the fixing of the legal prescript, since what gives the command its character as law is merely the nature of its content as a legal prescript. And furthermore the legal prescript from the outset contains the law-command as a necessary moment, since one cannot will that something be law without willing at the same time that it have binding force." Hence Gierke concluded that the sanction was by no means a logically necessary moment in legislation, but merely represented an inevitable part of the public law of constitutional monarchy. Here, he contended, it is derived not from the nature of law, but from the nature of monarchy which demands a concentration of highest power in the hands of the monarch. Thus in a republic the conception of the sanction could be entirely lacking.<sup>88</sup>

To this criticism Laband made the formally correct reply that a legal rule before its definitive adoption by the organ of the State endowed with the right to issue binding com-

<sup>87</sup> *Das Staatsrecht des deutschen Reiches*, II, 4.

<sup>88</sup> *Zeitschrift für das Privat- und Öffentliche Recht der Gegenwart*, VI Bd., 1879, p. 229.

mands was without authority, whereas after it had been sanctioned, although its content had been in no way changed, it immediately assumed the character of universally binding law. Carrying the contemporary doctrine even farther than usual, he asserted that the part played by the parliament in constitutional monarchy had no direct relation to the people since it was only the king's sanction which gave objective validity to the parliamentary proposals. "The sanction," he wrote, "is the heart of the whole process of legislation; everything that precedes it in the way of legislation is only preparation for it, fulfilment of necessary conditions; everything that follows it is necessary legal consequence of the sanction, unalterably brought about by it."<sup>39</sup>

The simple truth of the matter was well stated by Otto Mayer. He remarked that even though Laband restricted the people's representatives to the preparation of the content of law, "still that does not change the naked fact that whoever freely takes part in the decision as to whether the content of law shall or shall not be, has also a say over the power of law and makes his will jointly effective in it."<sup>40</sup>

A strong supporter of Laband in this controversy was Philipp Zorn, who upheld the unique might of the sanction as firmly as did Laband himself. Like the majority of the jurists, Zorn held that without the right to determine competence there could be no sovereignty, and that sovereignty found its most significant expression in legislation. Whoever laid down the laws, he said, was the possessor of sovereignty; but what laws were laid down was far less important than that the State demonstrated its rulership by imposing the sanction. "The sanction," according to Zorn, "is that public law act which perfects the law. In the sanction lies the command in law. Whoever issues the command is the legislator. The sanction is the highest and true act of legislation; therefore the right of sanction belongs only to the bearer of sovereignty."<sup>41</sup> With Laband he denied to the representative

<sup>39</sup> *Das Staatsrecht des deutschen Reiches*, II, 29-30. Cf. *Deutsches Staatsrecht*, 1907, pp. 108-110; Haenel, *Studien zum deutschen Staatsrecht*, II, 1886, §6.

<sup>40</sup> *Deutsches Verwaltungsrecht*, I Bd., 1895, p. 70.

<sup>41</sup> *Das Reichs-Staatsrecht*, I Bd., 1880, pp. 111-112.

assembly in a constitutional monarchy any further share in legislation than the mere determination of the content of law.

Jellinek, as has been said, adopted a midway position. On the one hand he insisted that the conscious formal development of law in modern times was the prerogative of the State alone: nobody other than the State has an underived right to issue binding commands; and yet on the other hand the material content of the law which the State sanctioned—Jellinek did not attempt to minimize the importance of the content of law—was in almost every case derived from existing social relationships or from other factors external to the formal legislative machinery of the State. From a formal standpoint he sided with Laband in saying that “the function of the legislator consists in endowing with legal force rules which shall serve to guide human action,”<sup>42</sup> although he conceded a greater importance to the share in legislation of the representative organs than did Laband.<sup>43</sup> From a material standpoint, however, he approached close to the position of Haenel and Gierke.

For Jellinek to have made the coercive element in law its essential factor would have been to discredit the principle of auto-limitation which he had established as the center of his system. If law were law only because it could be enforced by the sovereign power of the State, then it could not be held to be binding upon the State because, by definition, the State was subordinated to no power legally endowed with the right of coercion. As the solution of this problem, Jellinek, ignoring Haenel's more natural version of the relation between law and State, put forward his doctrine of auto-limitation, which he regarded as the one sound theoretical foundation for and construction of the law-nature of public and international law.

<sup>42</sup> “Besondere Staatslehre,” *Ausgewählte Schriften und Reden*, II Bd., p. 317.

<sup>43</sup> But see *Gesetz und Verordnung*, 1887, p. 317. Georg Meyer, *Lehrbuch des deutschen Staatsrechtes*, 4th ed., 1895, p. 491, took the same middle path as Jellinek: “Formally the issuance of laws occurs through the monarch; materially the laws rest upon an agreement which takes place between the crown and *Landtag*.”

Against this theory the protest was immediately raised that such a notion was little better than nonsense since it was manifestly impossible to conceive any will effectually and legally limiting itself. Jellinek replied with much justice that if the element of compulsion were really as fundamental to law as his opponents claimed it to be, then clearly the idea of the *Rechtsstaat* and of a legally organized community of sovereign States was the idlest possible dream. To establish his theory by analogy, he asserted that not only was the concept of auto-limitation not an unknown and absurd one, but that it was, in point of fact, the basis of all ethical thought: to destroy it would be to tear down the whole ethical structure and return to the reign of arbitrary force. Similarly, he continued, free law from its ethical and psychological foundations, and it will be seen to be nothing but a house of cards that the first puff of wind will topple over.<sup>44</sup>

By an ingenious interpretation of the mechanics of legislation, Jellinek was enabled to point out a period in the life of every law during which it was binding solely upon the State itself and upon no one else: the interval between its legal adoption and the application of the sanction on one hand and its coming into force on the other. In this interval

<sup>44</sup> *Die rechtliche Natur der Staatenverträge*, 1880, p. 37. Cf. *Allgemeine Staatslehre*, 11<sup>tes</sup>. Kap. Jellinek, especially in his later period, laid much emphasis upon the subjective psychological elements of law, and a quite false impression of his general position might be given by presenting only the formalistic aspect of his theory. Thus he argues that the positivity of law, for example, rests "in letzter Linie immer auf der Überzeugung von seiner Gültigkeit. Auf dieses rein subjektive Element baut sich die ganze Rechtsordnung auf. Das ergibt sich als notwendige Folge der Erkenntnis, dass das Recht in uns steckt, eine Funktion des menschlichen Gemeinschaft ist und daher auf rein psychologische Elementen ruhen muss." The State, in this view, gives the necessary guarantee that a power stands behind the law ready to enforce its claims against individual offenders; but there are also many other social-psychological guarantees of the law's enforcement. Jellinek concedes that the power of the State often is unable to enforce the law against the opposition of these other factors; *Allgemeine Staatslehre*, pp. 333 ff.

Roscoe Pound, 25 *Harvard Law Review*, 506, speaks in high praise of Jellinek's psychological contributions, and refers to his theory of the relation of State and law as "a needed corrective of the imperative ideas which have sprung up in the wake of German legislation."

the statute, although it is not yet binding on the members of the State, is as binding upon the will of the State itself as if it had already come into public effect. As the self-acknowledged will of the State, it cannot be altered or discarded save through the usual constitutional legislative channels. Thus, Jellinek concluded, in this phase of its existence every law exhibits in its purest form "the exclusive character of all the norms of positive law: the *Selbstverpflichtung* of the power of the State."<sup>45</sup> If this be true, he urged, then the element of coercion as the essence of law is done away with, and international and public law retain their true character of norms bilaterally binding on personalities which are the subjects of reciprocal rights and duties.

The ultimate foundation of law, Jellinek held to be its rationality and its objectification of the ethical consciousness of the community and of the existing material balance of power in the community. That international law was less stable and secure than the public law within each State, he attributed not to the lack of a coercive authority over the States, but to the fact that the common consciousness of the community to which it applied was at a considerably lower stage of development than that existing within the borders of the individual States.

### MONARCHY AND SOVEREIGNTY

All the writers who have been discussed above regarded the State-person as the bearer of sovereignty, while the individual organs of the State enjoyed the exercise of sovereignty only in their capacity as organs of the greater whole. The one exception to this view was Max von Seydel, to whose opinions on this aspect of sovereignty scant attention was paid, although his influence in Germany in regard to sovereignty in federalism was epoch-making. Seydel by no means disputed the necessity for or the existence of a supreme and highest power, but he denied that the contemporary jurists were justified in attributing this power to the State. The latter, he contended, was not the subject of this

<sup>45</sup> *Die rechtliche Natur der Staatenverträge*, p. 36.

power but the object of it. He drew an analogy between the private law process by which a thing becomes property by being owned and is the object of that ownership, and the public law process by which land and people become State by being ruled and, as State, are the object of rulership.<sup>46</sup> Since law is the creation of the ruler and consists of the body of rules laid down by him for the intercourse of his subjects, his title to rule must be prior to law, and is legally a fact and no more. The king, according to Seydel, "derives his power from no legal source, especially from no delegation on the part of the people or of the 'State.' He rules with his own power and for that very reason this power knows no sphere which is legally withdrawn from its operations."<sup>47</sup> But even if Seydel started one step below the others with his conception of sovereignty, still he found them none the less in essential agreement with him from that point down.<sup>48</sup>

Seydel argued that the ruler was not the organ of any higher personality or entity, while his contemporaries believed that all powers exercised by the organs of the State were derived from the State itself; but both agreed that, in the German conception of the State, the powers of all organs in an absolute or in a constitutional monarchy must be regarded as deriving from the monarch. Nor was even the difference in viewpoint as to whether the subject of sovereignty was State or monarch as great as might be

<sup>46</sup> *Annalen des deutschen Reiches*, 1898, p. 324.

<sup>47</sup> "Das Staatsrecht des Königreichs Bayern," II Bd., IV Abth. of Marquardsen's *Handbuch des öffentlichen Rechts*, 2d ed., 1894, p. 18. See Gierke's biting and scornful criticism of Seydel in "Die Grundbegriffe des Staatsrechts," *Zeitschrift für die gesamte Staatswissenschaft*, 30 Bd., 1874, pp. 169-198. Seydel's avowed realism Gierke discarded as mere materialism, while he denied both logical coherence and consistency with the facts to the theory as a whole.

<sup>48</sup> There were, however, some significant differences. Seydel, for instance, denied that there could be any international law: "Der Grund des Rechtes ist die Herrschaft, der Grund der Herrschaft ist die Macht. . . . Zwischen den Staaten ist aber eine Rechtsordnung nicht möglich, denn diese setzt einen höchsten Herrscherwille als Rechtsquelle voraus. Wäre dieser vorhanden, so wäre der Weltstaat gegeben. . . . Zwischen den Staaten kann mithin kein Recht sein, zwischen ihnen gilt nur Gewalt"; *Annalen des deutschen Reiches*, 1898, pp. 12, 31-32.

It will have been noticed that Gerber's influence on Seydel was far from negligible despite the latter's denial of the sovereignty of the State.



thought at first sight. The view of State and sovereignty of all these writers was after all merely an outgrowth of the long and honored tradition of monarchical rule; and Seydel in clinging to the older version as stated by Maurenbrecher only lagged behind the others in adapting his theories to the new conditions. Sovereignty was conceived as coming from above and not from below. "The notion of a city," says Aristotle, "naturally precedes that of a family or an individual, for the whole must necessarily be prior to the parts."<sup>49</sup> It was so that the German jurists regarded the sovereign power of the State. As once the monarch had been the possessor of sovereignty in his own right, so now sovereignty inhered in the State by the very nature of its being.

"The spirit of the Prussian people is monarchical through and through, *Gott sei dank!*" cried Bismarck once;<sup>50</sup> and what the great statesman hailed in Prussia he might have found in all the German States as well. It would be merely monotonous to heap up evidence of that which must be obvious to anyone acquainted with pre-war Germany. If the position of the Kaiser was not, as such, a monarchical one, still he himself was prone to regard himself as endowed with the rights divinely attributed to kings, and the German people tended indubitably to look upon him as a monarch. To give a single illustration: even so keen and discriminating a historian as Friedrich Meinecke publicly declared at an imperial celebration in 1913 that "we see the foundation and cornerstone of our State-life in the national monarchy, which we will not allow to be tampered with. It has no mere rational value for us but an irreplaceable emotional value. The heart of the German, bravely as he may venture flight into the land of ideas, always opens wide its doors only when the living personality appears before him as the bearer of the Idea. We are not satisfied with the consciousness that our nation is a great spiritual collective personality, but we demand for it a leader for whom we can go through fire."<sup>51</sup>

<sup>49</sup> *Politics*, Bk. I, chap. 2.

<sup>50</sup> Cf. Otto von Bismarck—*Deutscher Staat*, ausgewählte Dokumente eingeleitet von Hans Rothfels, 1925, p. 209.

<sup>51</sup> *Logos*, IV Bd., 1913, p. 171. Hugo Preuss writes: "Im allgemeinen

Such was the case in the non-monarchical Reich. In the several States themselves, avowedly built upon the principle of monarchy, the sovereignty of the prince went undisputed; indeed the constitutions themselves affirmed it. The statement of the Bavarian Constitution may be taken as typical: "The king is the head of the State; he unites in himself all the rights of the *Staatsgewalt* and exercises them according to the conditions established by him in the present Constitution." Here then as early as 1818 is the doctrine of auto-limitation as applied to the king who gives himself and his State a constitution, and allows other organs to join with him in the formulation of his sovereign will.<sup>52</sup> It is impossible to doubt the truth of Otto Mayer's assertion that "the idea of popular sovereignty has never become the foundation of the structure of the State for us. The whole power of the State is in principle united in the prince."<sup>53</sup>

schien die obrigkeitliche Monarchie fester zu stehen als irgendwo sonst," *Deutschlands Staatsumwälzung*, 1920, p. 2.

It deserves mention, however, that the jurists, whatever their other sins, never took the Reich as a monarchy or the Kaiser as a monarch.

<sup>52</sup> Meisner's rendering is unexceptionable: "Juristisch ausgedrückt, sagt das Dogma vom monarchischen Prinzip: Die Verfassung gilt als Selbstbeschränkung des Monarchen, für dessen Zuständigkeit und Unbeschränktheit im Zweifelsfalle die Vermutung spricht"; *Die Lehre vom monarchischen Prinzip*, 1913, p. 2. It cannot be emphasized too often that this was the almost unquestioned version of monarchy in Germany until the 1918 collapse.

<sup>53</sup> *Deutsches Verwaltungsrecht*, I, p. 60. Cf. his "Republikanischer und monarchischer Bundesstaat," *Archiv für öffentliches Recht*, 18 Bd., 1903. "Das Prinzip der Volkssouveränität gilt nicht in Deutschland. . . . Die Kronen in Deutschland . . . sind . . . älter als die Verfassungen; niemals und nirgends hat auf die Dauer die Revolution in Deutschland gesiegt. . . . Der Monarch ist nach den in Deutschland geltenden Verfassungen Träger der gesamten Staatsgewalt und leitet seine Rechte von keinem andern Organe des Staates, auch nicht vom Volke ab. Dies wird dadurch ausgedrückt, dass die Gewalt des Monarchen, 'von Gottes Gnaden,' *dei gratia* ist"; Adolf Arndt in Birkmeyer's *Encyclopädie der Rechtswissenschaft*, 1901, pp. 746-747, 800. Cf. Klöppel, *Gesetz und Obrigkeit*, 1891, p. 96; Conrad Bornhak, *Allgemeine Staatslehre*, 1896, pp. 37-38, and *Preussischen Staatsrecht*, 1883, I, pp. 64 ff.; Rönne-Zorn, *Das Staatsrecht der Preussischen Monarchie*, 5th ed., 1899, I, x-xi, 203-204: "Die *plenitudo potestatis* ruht nach preussischem Staatsrechte im König; der König ist Grund und Quelle alles Rechtes in Preussen. An diesem Fundamentalsatz hat auch die Verfassungsurkunde nichts geändert"; Seydel, *Das Staatsrecht des Königreichs Bayern*, pp. 18-19, etc. See also Joseph Barthélemy, *op. cit.*, chap. II.

The prevailing system of political organization in Germany—except in the Reich itself—was far from being conceived as a parliamentary system of government with a personal sovereign at its head. The hierarchy extended from the top down, not from the bottom up. It did not culminate in a monarch, but began with him. If he lacked certain rights and powers in fact, the obvious implication was that his majestic plenitude of sovereignty had graciously restricted itself within certain limits constitutionally defined.

The consequences of this hard-dying tradition for the theory of sovereignty have been shown above. Not only did it lead to such subtleties of juristic construction as the virtual absorption of the legislative process into the sanction, but it shaped the whole conception of sovereignty in its own image. Sovereignty was the supreme, indivisible, illimitable power of the King-State. This power was original with the King-State, and belonged to it (or him) in its own right, being in no way a delegation from the people. The King-State had, by means of auto-limitation, confined itself to certain spheres and modes of action, but the formal decision as to its competence rested with itself exclusively always. The sovereignty of the King-State expressed its juristically absolute supremacy over all individuals and other associations within its territorial boundaries, and its absolute legal independence of control by other members of the international community of States.<sup>54</sup>

#### SOVEREIGNTY AND ADMINISTRATION

The romantic prominence into which the *Rechtsstaat* had been thrust by Stahl, Bähr, Gneist, and others, was in large measure dissipated when these writers were replaced by the new school of jurists who had grown up under the aegis of the Empire. The new juristic temper afforded little scope for general abstract discussion; and, furthermore, increased experience of the constitutional régime led eulogy to give way to sober discussion of administrative facts and possibili-

<sup>54</sup> "The rulership of the State is legally unlimited and illimitable. . . . Through inner necessity the State is thus absolute, whatever its constitutional structure may be," Conrad Bornhak, *Allgemeine Staatslehre*, p. 11.

ties. The jurists turned themselves to the task of searching out the provisions of the existing German administrative systems and canvassing the methods by which the sovereign power of the State as exercised by its executive organs might in practice be subordinated to the law.

Almost immediate success had attended Gneist's plea for courts of administrative law which should be at once distinct from the usual civil courts and yet not dominated by the politically appointed ministers of the day. The first appearance of such courts was in Baden, but it was the reform of Prussia's administrative system in 1872 which gave them the final stamp of official approval. Neither in the Reich nor in the several States was the process one of erecting a single central court such as the *Conseil d'État*, competent to decide in all cases under administrative law: the accepted practice was gradually to bring wider and wider spheres of administrative action under legal control by the creation of courts competent to deal with certain enumerated matters. But at the bottom lay the broad general principle that the sovereign State in its executive guise must remain within the law or else risk being held legally responsible for its illegal acts.

This underlying principle was accepted in general terms by all the publicists of the period, although there were considerable divergences of opinion as to its detailed application. There was, in fact, no great difficulty in constructing a juristic formula which would harmonize sovereignty and the *Rechtsstaat*. As a typical formal construction that of Gerhard Anschütz, which does not pretend to be more than a summary of generally accepted doctrines, may be taken.<sup>55</sup> The State is, juristically, a person, and as such is endowed with a will, the unique feature of which is its capacity to rule. Since rulership implies power over free men, the essence of the State's will is power (*Gewalt*) while the will itself may be termed the *Staatsgewalt*. The *Staatsgewalt* is to the State as the will is to a person. The unity of the

<sup>55</sup> "Justiz und Verwaltung," Hinneberg's *Die Kultur der Gegenwart*; Teil II, Abt. VIII, 1906, pp. 336-337. This passage is also clearly indicative of the contemporary reliance on Gerber.

*Staatsgewalt* is predominant among its attributes: a single will must correspond to the single personality of the State. The will of the State is one and indivisible and hence can never be in conflict with itself; but this by no means excludes a separation of powers according to the different functions performed by the State. The accepted separation is the threefold one into legislative, judicial, and administrative branches.

In its legislative function the *Staatsgewalt* sets up general norms which are binding upon and inviolable for all, including the judicial and administrative organs of the State. The legislative power is the highest expression of the State's will: in its judicial capacity and as executive the State is below the law, as legislator it is above it.<sup>56</sup> Administration, on the other hand, is the actual carrying into effect of the State's will, and must always be within the limits established by law.

In brief, the primary expression of the will of the State-person is to be found in the law, and all other elements of the State must subordinate themselves to that will lest they disrupt its unity. The executive is not a free organ endowed with the right to determine its own competence, but must act only within the bounds set for it by the legislator. Constitutional government provided exactly the materials that were necessary for such a subsumption of the executive under the law. Where there had been no constitution it had been impossible to find any formal distinction between the executive and legislative acts of the prince; under the constitutions it was established that the sovereign legislative will of the State could only come into being when the prince had acted concurrently with the estates. Except where expressly or implicitly stated by the constitution the will of the prince could not legally override the laws of the State or alone create new laws. As executive he could act only within the limits by law ordained. He might be authorized

<sup>56</sup> This must of course be qualified by the further statement that the State can alter existing law, i.e., is above the law, only according to the constitutional provisions for such action.

to complete laws or to order their execution, but he could not arbitrarily bring them into being or amend them.<sup>57</sup>

Thus, the customary theory ran, the State, by limiting itself to the life of the law and by conceding its legislative organ explicit and ultimate authority over the executive, could succeed in controlling the executive without impairing its own sovereignty. The State remained a sovereign unity, but a unity the life-condition of which was law.

Laband, for example, contended that "it is not disputed that there must be a supreme and highest power, which is subordinated to no other earthly power, and which is in truth the *potestas suprema*."<sup>58</sup> But at the same time he insisted that "the *imperium* in the modern civilized State is no arbitrary power, but one determined by legal prescriptions (*Rechtssätze*). It is the characteristic of the *Rechtsstaat* that the State can require no performance and impose no restraint, can command its subjects in nothing and forbid them in nothing, except on the basis of a legal prescription."<sup>59</sup>

Laband, however, was far more explicit in laying down the general theory of administrative legality than in discussing the practical remedies for illegal actions on the part of the executive. Every administrative command of the State, he maintained, must rest on a law authorizing such a command, or at least, as he elsewhere puts it, not overstep the boundaries established by law;<sup>60</sup> but he was content to state the justiciability of executive acts in the following equivocal fashion: "Wherever the State has a greater interest in having the law (*das Recht*) fulfilled, *i.e.*, in having the abstract rules of law applied equably and without the influence of other interests, than in achieving a given material result or in putting a measure through," there it submits,

<sup>57</sup> Cf. Laband, *Das Staatsrecht des deutschen Reiches*, II, 175.

<sup>58</sup> *Deutsches Staatsrecht*, 1907, p. 17.

<sup>59</sup> *Das Staatsrecht des deutschen Reiches*, II, p. 186; cf. p. 193.

<sup>60</sup> "Administration is not merely application and execution of public law, but at the same time develops it and is one of its sources. Since administration, within the boundaries established by law, seeks the satisfaction of social and political needs, it leads to new legal prescriptions," *op. cit.*, pp. 186-187.

when its actions are contested, to judicial proceedings.<sup>61</sup> From his own positivistic standpoint, however, Laband was no doubt justified in this statement of the situation since the constitutional theory of the Reich unquestionably demanded absolute executive adherence to the law, while the measures for ensuring such adherence were only fragmentarily and haltingly evolved; but the hiatus is none the less striking.

Contrary to Gerber, who had scorned Bähr's idea of throwing open the usual civil courts to administrative matters,<sup>62</sup> Laband took no very definite stand on the issue of special administrative courts versus the usual civil courts. He conceded that in theory there was no reason why the State should not perform all its functions under the provisions of private law, and hence be subject to the usual courts; but at the same time he recognized that in fact the State operated in part at least under different laws, and that this made the provision of special courts advisable. But whatever the method of control exercised over the executive, Laband remarked it to be indubitable that "the sovereign State and its organs can in no case be subordinated to legal coercion which does not in the last analysis arise from its own will. . . . Therefore all administrative acts of the State, no matter what their content, are free, determined by no higher will than its own. But that also holds if they are subordinated to the usual civil law and the jurisdiction of the courts since the binding force of the civil law and of the civil courts rests on the power and will of the State."<sup>63</sup> In

<sup>61</sup> *Op. cit.*, III, 379-380. This statement is in keeping with the German theory and practice of subordinating the executive to the law by means of the gradual legislative enumeration of administrative matters which might be brought under administrative-judicial review.

<sup>62</sup> Gerber argued that the courts have their own defined place in the State organism, and that to place them above the executive would be to unbalance this organic structure: "Man würde die Macht, auf welchen ihre Autorität beruht, und der sie zu dienen berufenen sind, in ein Objekt ihrer Gewalt verwandeln"—*Grundzüge*, p. 181. Furthermore, the State can never appear as a *Processpartei*. The subordination of the executive to the courts would upset the whole natural scheme of organization, and cripple the State, p. 201.

<sup>63</sup> *Archiv für öffentliches Recht*, II Bd., 1887, p. 158. Cf. *Das Staatsrecht des deutschen Reiches*, II, 183-189, 202; III, 379 ff.

other words, it is the sovereign State which binds itself to live the life of the law, and the sovereign State which judges and corrects the legal misdeeds of its organs.

If Laband was unable to arrive at any formula for the jurisdiction of civil and administrative courts or for the scope of effective legal control over the executive, he was, however, able to take a more decided stand in regard to the responsibility of officials since it had been proclaimed by law in the Reich that every official was responsible for the legality of his official acts. Where expediency alone was concerned the official bore no legal but only an administrative responsibility. The lack of legal foundation, however, made the act invalid and ineffective, and brought down upon its author legal responsibility to anyone damaged thereby. "The lack of expediency," as Laband phrased it, "finds its remedy within the administrative organism itself; the lack of legality brings the executive into collision with the legal order."<sup>64</sup>

On the whole Laband's treatment of the problem of legal control of the executive was conventional, stiff, and almost always from the standpoint of the State, regarded as a sovereign and indivisible person. Jellinek, on the other hand, examined into the subject more closely and appreciated its intimate relation to the daily life of the community. Where Laband was content with achieving an adequate juristic construction, Jellinek had the further aim of securing protection for the individual against illegal encroachments by the State.

This difference is illustrated by Laband's contention that the inner regulation of the administrative system by means of ordinance—even though it might vitally affect the interests of the public—was not to be regarded as law. The State, he said, found legal barriers limiting the spheres of its executive organs when, and only when, it came into contact with its subjects. Rules, on the other hand, which keep within the executive itself and which in no way either impose

<sup>64</sup> *Das Staatsrecht des deutschen Reiches*, II, 195; I, 461.



restrictions upon or give rights to any person outside the executive, are not legal rules.<sup>65</sup>

On this point Laband was justly challenged by both Jellinek and Haenel. The latter, setting out from his presupposition that law and the State are inseparable, suggested that Laband's difficulty lay in postulating the State as a unit person (*Personeneinheit*) instead of as the legal relationship of a plurality of persons (*Rechtsverhältniss einer Personeneinheit*). Apart from its organs, Haenel held, the State has no reality, but is a mere intellectual abstraction. The "reality" of the State is hence to be found precisely in the network of law which orders the relations of these organs and delimits their spheres of competence.<sup>66</sup>

Jellinek's protest against Laband followed much the same lines: "The whole inner system of the State is legal system because it exists not for the abstract State, but for the concrete community of men from which it is formed." Even though the individual outside the executive machinery of the State is not directly concerned in its inner processes still the community as an organized whole has a decided interest in the existence and maintenance of the legal system regulating the inner structure of the State.<sup>67</sup>

Jellinek's general administrative theory centered about his conception that "by means of auto-limitation the State transforms itself from a merely physical power into one legally limited in respect of other personalities, and through this very process itself wins legal personality both internally and externally."<sup>68</sup> The legal person was for Jellinek the bearer of rights and duties, and in consequence could not be unilateral since in the very conception of legal personality there was implied a correlative subject of rights and duties. Thus if the State were to be conceived as absolute in the sense that it had no duties and recognized no

<sup>65</sup> *Ibid.*, II, 181, 86. Rosin, *Das Polizeiverordnungsrecht in Preussen*, 1882, p. 20, sided with Laband in this controversy.

<sup>66</sup> *Studien zum deutschen Staatsrechte: Das Gesetz im formalen und materiellen Sinne*, 1888, pp. 229 ff. Cf. his *Deutsches Staatsrecht*, pp. 99 ff.

<sup>67</sup> *System der subjektiven öffentlichen Rechte*, 1892, p. 22; cf. *Gesetz und Verordnung*, 1887, pp. 215 f.

<sup>68</sup> *Gesetz und Verordnung*, p. 199.

rights against itself, the State could not be a legal person and there could be no legal relations between State and subjects or between State and State. Through auto-limitation, however, the State created at once its own personality and that of its subjects: what had been a relationship of lordship and subjection became one of law.

"Not the least significant element of modern political history," Jellinek wrote, "is contained in the constant growth of individual personality accompanied by the limitation of the State."<sup>69</sup>

In the modern State, the Austrian jurist contended, the individual could not only claim certain spheres of freedom from the State but he also had rights against the State and could demand a varying degree of participation in its affairs. Adequate protection of these rights of the individual required in the first place the subordination of the executive to the law, and second the setting up of formal legal machinery by which the individual might test the legality of administrative acts and secure redress for injury.

The underlying principle here Jellinek formulated, in close accord with Laband, as the maxim that the executive "is confined within the limits of law, that it may not demand anything of the individual or command him in anything except that to which it is expressly authorized by legal prescription."<sup>70</sup> This maxim is, of course, subject to the customary qualification that the mere mechanical execution of laws does not exhaust the administrative function of the State which must have in addition a free discretionary sphere, legally limited but not directly inspired by law.

But Jellinek saw the State as ruler being gradually replaced by the State as, so to speak, social manager. Instead, he predicted, of making use of its undoubted and unique prerogative of commanding, the State would in future increasingly adopt the method of attaining its ends through the same social channels as those open to any other individual or corporation engaged in the administration of its affairs. The essential difference between State administration

<sup>69</sup> *System der subjektiven öffentlichen Rechte*, p. 81.

<sup>70</sup> *Ibid.*, p. 340.

and that of any other corporation, Jellinek found in the *Herrscher-macht* which always gave to the State a potential advantage over any other administrative organization.<sup>71</sup>

But whether the State acted as ruler or as social manager, Jellinek demanded that it be subordinated to the jurisdiction of legally established courts. The dispute as to whether these should be the civil or special administrative courts did not concern him much, although he accepted as an historical fact the ever widening jurisdiction of administrative courts both in France and Germany. "In the extension of legal jurisdiction (*Rechtsprechung*) over the field of public law," according to Jellinek, "is to be seen one of the most significant strides forward in the growth of the modern State in the course of the nineteenth century." In the light of the gains made in this direction in the last century, the Austrian jurist confidently believed to be reserved for the future the attainment of that elusive good, an inviolable legal order, as a permanent possession of the State and thus of mankind.<sup>72</sup>

As to the responsibility of the State for illegal acts committed in its name, Jellinek held that no *a priori* rules could be laid down, since on the one hand the responsibility of the master for the acts of the agent depended upon the particular circumstances, and on the other the extent to which the sovereign State bowed to the law depended upon its explicit submission as expressed in positive law at any given time. He indicated that he believed that the State should assume subsidiary pecuniary responsibility for any official who was unable to meet the full legal demands upon him for administrative misdeeds. But however uncertain the position of the State, Jellinek claimed that the full responsibility of the official convicted of illegal action was unquestionable, since, in so acting, he had ceased to be an organ of the State, *i.e.*, had ventured beyond his competence as organ of the State, and thus subjected himself to civil actions against him.<sup>73</sup>

<sup>71</sup> *Allgemeine Staatslehre*, pp. 622-624.

<sup>72</sup> *Ibid.*, pp. 794-795.

<sup>73</sup> *Ibid.*, pp. 793-794. *System der subjektiven öffentlichen Rechte*, p. 232. "It is not to be comprehended why the State should take over responsibility for acts of its officials which it not only did not command or permit,

A similar view concerning the indeterminateness of the responsibility of the State was put forward by Edgar Loening, a jurist who confined himself almost solely to the sphere of administrative law. Although he recognized an increasing tendency among publicists to demand that the State compensate those damaged by illegal acts or omissions of its organs, Loening denied the possibility of any general rules. The State as *fiscus* had, he agreed, voluntarily placed itself on a private law footing and hence was bound in this character to the customary private law stipulations; but the State as sovereign ruler he held to be in a different category. Neither positive law nor justice, he contended, "demands any general responsibility of the State. There is absolutely no general principle which decides this question. It requires rather an investigation into the particular relations into which the State entered with its subjects in order to decide, according to their legal nature, whether or not it is justified to hold the State liable for illegal acts of its officials."<sup>74</sup> On the whole Loening was not disinclined, contrary to Jellinek, to safeguard and extend the State's sphere of sovereign prerogative at the expense of the individual. At the best he saw only a subsidiary liability on the part of the State, a contention which he based on the inadequate foundation that it was normally the right and duty of the individual to resist illegal official actions or commands and that the State could not be made responsible for his failure to do so.<sup>75</sup>

Furthermore, Loening denied that it was either the duty or the right of the individual to bring any positive pressure to bear on the State in order to make it fulfil its legal obligations. Where the State had tasks which it was legally obliged to perform, this was the concern of the State alone and not of its subjects. The individual could play an active part only in the defense of his own legally established rights

but which it had directly forbidden or declared punishable," Lorenz von Stein, *Die Verwaltungslehre*, 2d ed., 1868, I, 369.

<sup>74</sup> *Die Haftung des Staates*, 1879, p. 135.

<sup>75</sup> *Ibid.*, pp. 117-123. Loening qualified this doctrine: 1. The State is liable to the extent that it has gained by official illegality, and 2. The State's subsidiary liability is inescapable when for the subject to resist threatened illegality is useless or involves grave danger or risk.

against any attempted executive encroachment. Since it is the duty of the State to guard its legal system against violations, it must set up judicial (or administrative-judicial) machinery by means of which the individual may call its attention to the fact that his rights have been infringed. Once so informed, the State, being interested for its part in the maintenance of law, undertakes the reëstablishment of the violated objective norm, an action which, happily, coincides with the restoration of the damaged subjective right.

The general trend of Loening's theory, with its assumption that the State is so far removed above the common multitude that the very execution of its laws is a matter which, legally speaking, concerns only the official hierarchy itself, is clearly evident in the following statement:

"The individual has no claim upon the State for the fulfilment of the tasks incumbent on it, or for the execution of the laws and ordinances which have been issued in the general interests of the State. As the State has not the task of promoting the private interests of individuals and as the laws of the State are not made in the private interests of individuals, so likewise the State is not obligated to repair the damage which accrues to individuals through the non-execution of laws."<sup>76</sup>

A quite different outlook from that of Loening is to be found in the writings of Otto Mayer, which give perhaps the best and most sympathetic version of the German theory and practice of administrative law. Defining the State simply as "the great institution for the management of the affairs of all with the means of the collectivity,"<sup>77</sup> he proceeded to discuss in the light of that definition and from the standpoint of positive law what should be and what in fact were the legal relations between the subject and the State.

<sup>76</sup> *Die Haftung des Staates*, 1879, pp. 126-127. Cf. *Lehrbuch des deutschen Verwaltungsrechts*, 1884, pp. 784 ff.

<sup>77</sup> "Entschädigungspflicht des Staates," in Stengel's *Wörterbuch des deutschen Staats- und Verwaltungsrechts*, 2d ed., 1911, I Bd., p. 732. Mayer gives a more elaborate definition in his chief work, *Deutsches Verwaltungsrecht*, I Bd., 1895, p. 3: "Der Staat ist der handlungsfähige Gemeinwesen, zu welchem ein Volk unter einer obersten Gewalt, der Staatsgewalt, zusammengefasst ist." See also *ibid.*, II, 369-370.

In contrast to earlier methods of political organization, Mayer saw the modern *Rechtsstaat* attempting as far as possible to subordinate its relations to its subjects to the legal system which it set up and maintained. The customary juristic construction of the *Rechtsstaat* on the basis of a separation of powers Mayer did not accept, but put forward a new version in its place. The sovereign State is, according to him, 'the subject of all public power, all other public powers being regarded as derived from the State. But if this entire public power is united in a single hand, then freedom is crushed. "Hence it must be broken up into different powers, each of which belongs to a particular will. These powers are not different spheres or branches of the State's activity, nor different spheres of authority; they are pieces of the *Staatsgewalt* and, like it, active forces, each equipped with special legal attributes in relation to the others."<sup>78</sup> For the present purpose the two of these powers which are of chief importance are the legislative power which has precedence over all others in the State, and the administrative which is conceived as "the activity of the State directed toward the realization of its ends under its legal system." The law, in other words, is always supreme and the administrative power is always subordinate to it.

As opposed to the illimitable freedom of the State's legislative will, Mayer held the executive to be triply bound: by the laws of the State, by its own administrative acts, and by the public rights of the persons with whom it came in contact. Against Haenel's assertion, however, that "every act of the State's will which is executive must be able to demonstrate its legal authorization and in consequence its restrictiveness,"<sup>79</sup> he contended that so narrow a limitation would not cover the necessary facts of administration.

The significance of administrative law lay for Mayer in the fact that its effect was bilateral, involving both State and subject and binding them together as juristic persons mutually endowed with rights and duties. Both State and subject were endowed with public rights, *i.e.*, with interests

<sup>78</sup> *Deutsches Verwaltungsrecht*, I, 68.

<sup>79</sup> *Studien zum deutschen Staatsrechte*, II, 197.

legally guaranteed and protected by the public power. The individual possessing a public right was thus seen as having a sphere of power or control over the public power itself (*Macht über die öffentliche Gewalt*). The State on its side, Mayer argued, has this public power by nature, and can compel the individual to fulfil his legal obligations; but for the subject of the State such a sphere of public power is not natural or inherent. Therefore, since the State is the sole source of public power within its territory, the individual's control over the public power must be at once derived from and a power over the State.

"The subject," Mayer wrote, "has a legal claim upon the State for the service, performance, or forbearance which the law prescribes that the State should undertake in favor of the individual. The nonobservance of such provisions of the law is a wrong to the subject. To set the wrong aside the subject may set the executive power in motion by means of the machinery for the protection of rights. The servant of the executive power through whose error this wrong was done to the subject is personally liable to him for the damage."<sup>80</sup>

The most effective and usual source of protection for the rights of the individual Mayer held to be the regular process of administrative activity which, in the *Rechtsstaat*, was so ordered as to ensure the maximum of administrative legality. Beyond this normal guarantee of legality he found three special methods of protection: the right of complaint (*Beschwerderecht*), administrative-judicial courts (*Verwaltungsrechtspflege*), and the jurisdiction of the civil courts. The former of these allowed the individual the right of appeal against the acts or orders of an official either to the official himself or to his superior in order that the alleged wrong, not necessarily merely formal illegality, might be righted. The *Verwaltungsrechtspflege*, on the other hand, indicated a more formal procedure, modeled on that of the civil courts, and taking the same general course. As the administration of civil justice determines the legal relation between persons, so the *Verwaltungsrechtspflege* determines

<sup>80</sup> *Deutsches Verwaltungsrecht*, I, 90; and all of §9.

the legal relation between the subject and the public power. Mayer held, however, that there was a considerable difference between the administration of civil and of administrative justice since the "rights" which the latter was called upon to protect were often of a dubious kind and partook rather of the nature of interests. As a consequence there was a growing tendency, according to Mayer, to regard the *Verwaltungsrechtspflege* as protecting not the subjective right, but the integrity of the objective legal system. The decision of the administrative court, he stated, was binding upon both State and subject; for the latter, it established a right as against the State to insist that the terms of the decision should not be overridden to his disadvantage.<sup>81</sup>

The third form of protection for the individual against the State Mayer found in the civil responsibility of the official for illegal actions on his part in the name of the State.<sup>82</sup> Where the State appears as *fiscus*, it and its representative are liable to third persons in precisely the same degree as any principal and agent under private law; but when the public law relationship of the State and its subjects is concerned then the responsibility of the official takes on a different aspect. The primary difference he held to lie in the fact that the relation between the three parties concerned in the two cases was far from being on the same footing. Where the public law relationship was involved the factor of the official's adherence or nonadherence to his duty took on a prominence which did not exist in the similar civil law case. Furthermore, the official has not the private agent's right of questioning the legality of his chief's commands, and in consequence should not be made to bear the burden of the illegality which he has dutifully committed: here it is the State which is at fault and must repair the damage which has been caused. In general Mayer's position was that if the act in question were established as contrary to the duty of the official then his liability to the complainant would be determined according to the provisions of the civil law in regard to forbidden acts and delicts.

With most of his contemporaries, Mayer denied the pos-

<sup>81</sup> *Deutsches Verwaltungsrecht*, I, 197.

<sup>82</sup> *Ibid.*, §17.



sibility of finding any stable general principle by means of which the liability of the State for the acts of agents in public law matters could be assessed.<sup>83</sup> Almost the only case in which he held that the State must assume liability is that which arises when financial burdens or sacrifices were imposed upon the individual without his consent and in contravention of the principle that burdens must be equally distributed.

Of the German theory of administrative law in general it may be said that it suffered from the same defect as virtually all of the German jurisprudence of the period between the founding of the Reich and the Revolution of 1918. Almost inevitably it deals with the subject from the top down rather than from the bottom up. While it is not borne out by the facts of the case to say that the characteristic German jurists were seeking to justify imperial autocracy and the right of might, still it is beyond question that they were held spellbound by the majesty of the State and, in many cases avowedly, failed to grasp the conception of the State as the organization and instrument of the community for certain common ends under a political and legal order broadly representative of the habits of life and thought of its members.<sup>84</sup> The phraseology of personal absolutism had been outmoded, but its ideology remained unmistakably present.

<sup>83</sup> *Ibid.*, II, §§53-54.

<sup>84</sup> Thorstein Veblen, *Imperial Germany and the Industrial Revolution*, 1918, comments on the Anglo-Saxon's difficulty in grasping the German idea of the State and the German's difficulty in understanding the Anglo-Saxon idea of the Commonwealth. For the German, he continues, p. 156, "in some potent sense, the State is a personal entity with rights superior and anterior to those of the subjects, whether these latter be taken severally or collectively, in detail or in the aggregate or average. The citizen is a subject of the State."

### CHAPTER III

### FEDERALISM

THE problem as to how to reconcile the Bodinian sovereignty of the sixteenth century with the limited constitutional monarchy of the nineteenth was solved, as has been shown above, by the comparatively simple expedient of granting to the State potential legal omnipotence and omnicompetence, the actual exercise of which at any given moment was determined by the limitations which the State itself had placed upon its potential formal absolutism. But in the period after 1871 it was not this general aspect of sovereignty which most perplexed the German jurists.<sup>1</sup> The vital issue which called out the full measure of juristic ingenuity was that of the relation between the concept of sovereignty and the new fact of federalism with its apparent subordination of a group of sovereign States to a new State of their own creation. Where in such a situation was sovereignty to be found?

The difficulties, theoretical and practical, inherent in any federal system, had been little explored by German publicists in the centuries before the crisis of 1848 had appeared with its federal constitution. Althusius had been frankly federalistic in his method of building up the political hierarchy, but he had had no followers; Pufendorf had hurled

<sup>1</sup> It would of course be absurd to pretend that the "general" concept of sovereignty which was discussed in the preceding chapter was derived independently of the theory of federalism. In point of fact, its central doctrine—*Kompetenz-Kompetenz*—became explicit only in the federalistic discussions and retained the most intimate connection with federalism throughout. In the writer's opinion, however, there is an unmistakable bond of sympathy between the theory of constitutional monarchy as stated in the Bavarian Constitution of 1818 and developed by Stahl and many others, and the federalistic doctrine of *Kompetenz-Kompetenz*. Undoubtedly federalism played the chief rôle in shaping the German view of sovereignty after 1871; but the theorists of federalism were fortunate enough to find preëxisting a theory of sovereignty which they might use with only slight adaptations.

invective at the *Monstrum* of the old Empire with its tangle of conflicting sovereignties; but no searching inquiry into the nature of federal government was made in Germany until the pressure of political necessity made such an inquiry inescapable.<sup>2</sup> Even after 1848 there was only one important contribution to the subject—that of the historian Georg Waitz, who had figured among the leaders in the Frankfort Parliament—and the theories here advocated held the field undisputed for nearly two decades. It was not until after the founding of the Reich that the battle over sovereignty and federalism divided the jurists into almost as many conflicting camps as there were individual writers.

Both the theory of Waitz and that of his opponent, Max von Seydel, who in 1872 wholly superseded him, were derived from American sources, the former from the *Federalist* and de Tocqueville, the latter from Calhoun. From that time forward German theory developed its own ingenious concepts and technique, but it was with foreign weapons that these early conflicts were waged.

In the *Federalist* it was laid down as of cardinal import that the proposed constitution of the United States “is, in strictness, neither a national nor a federal constitution, but a composition of both.” The member States of the federal union are to “be regarded as distinct and independent sovereigns.” Both the central authority and the several States composing the Union were held to be supreme in their respective spheres: “the federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes.”<sup>3</sup> It was in the same vein that de Tocqueville wrote of the United States that one saw there “two governments, completely separate and almost independent: the one fulfilling the ordinary duties and responding to the daily and indefinite calls of a community, the other circumscribed within certain limits, and only exercising an exceptional

<sup>2</sup> For the early history of the theory of federalism, see Gierke, *Johannes Althusius*, 3d ed., 1913, 2<sup>ter</sup> Teil, 5<sup>tes</sup> Kap.; Siegfried Brie, *Der Bundesstaat*, 1874, pp. 1-71.

<sup>3</sup> Numbers XXXIX, XL, and XLVI.

authority over the general interests of the country. In short there are twenty-four small sovereign nations, whose agglomeration constitutes the body of the Union.”<sup>4</sup> Untroubled by the strict canons of classic political jurisprudence, de Tocqueville, like the authors of the *Federalist*, was easily able to resolve the difficulties of federalism by means of the conception of divided sovereignty.

It was this theory which, given somewhat more precise and systematic form by Waitz, dominated German political thought as long as the problem of federalism remained a speculative one. When it became a present fact new and more finely spun juristic constructions took the field. Waitz, although he had taken an early degree in jurisprudence, wrote primarily from a historical and political rather than from a formal and juristic standpoint, and his theory of federalism must be regarded as a by-product of his elaborate studies in German constitutional history and of his service in the *Paulskirche*. In consequence it was scarcely to be expected that his theories should survive the close scrutiny of the new juristic school.

Like his French and American predecessors, Waitz rested his federal theory on a threefold foundation: the division of sovereignty and function between the center and the particular States; the complete independence of organization of the two systems, each free in its own sphere; and equality between the two in the sense that each was sovereign in relation to its own functions.<sup>5</sup>

Setting a precedent for all who followed him Waitz opened his epoch-making article on federalism<sup>6</sup> with a discussion of the distinction between the *Staatenbund* and the *Bundesstaat*. It is not necessary to enter here into the details of the controversy over this distinction. Broadly speaking, there was general acceptance of the definition given by Waitz of the *Staatenbund* as an association of separate

<sup>4</sup> *Democracy in America*, tr. by H. Reeve, 1898, I, 73.

<sup>5</sup> Cf. Eugène Borel, *Études sur la souveraineté et l'état fédératif*, 1886, p. 111.

<sup>6</sup> “Das Wesen des Bundesstaates,” *Allgemeine Monatsschrift für Wissenschaft und Literatur*, 1853. This article was later reprinted in Waitz's *Grundzüge der Politik*, 1862.

States by means of a treaty or agreement under international law for the common fulfilment of essential political tasks. When the doctrine of divided sovereignty was discarded this definition was usually amplified by the explicit declaration that sovereignty in the *Staatenbund* remained in the undisturbed possession of the several States,<sup>7</sup> but this addition would probably have been acceptable to Waitz. Such good fortune did not, however, attend his definition of the *Bundesstaat* as that form of State in which a part of the "general tasks of State-life is to be fulfilled jointly by the whole nation, another part separately by the individual stocks or divisions of the nation. . . . The distinctive feature is that each part must itself really be a State. In the *Staatenbund* the collectivity is not a State, in the *Staatenreich* the members are not; but in the *Bundesstaat* both must be. . . . But it is a primary requisite for every State that it be self-dependent, independent of any power external to it."<sup>8</sup> From this view of the *Bundesstaat* Waitz came to the conclusion that although both the central State and the member States had a narrower sphere of action than that of the customary unitary State, inside this sphere their right to exercise public authority was as great as that of the latter. The essence of the *Bundesstaat*, he declared, lay in the fact that sovereignty belonged exclusively to neither center nor parts, but inhered in both within their respective and separate spheres. In a phrase which drew down on his head the scorn of later generations he maintained that "only the extent, not the content, of sovereignty is limited."<sup>9</sup> This sovereignty, he held, was conceptually identical in both spheres, and in each case operated directly upon the indi-

<sup>7</sup> Thus Laband, *Das Staatsrecht des deutschen Reiches*, I, 57-58, saw the essential distinction between the *Staatenbund* and the *Staatenstaat* (of which the *Bundesstaat* is one variety) as being that "in the former the power of the individual States, in the latter the power of the center, is sovereign." Jellinek, *Allgemeine Staatslehre*, p. 762: "The *Staatenbund* does not legally diminish the sovereignty of the associated States."

<sup>8</sup> "Das Wesen des Bundesstaates," pp. 499-500.

<sup>9</sup> "Nur der Umfang, nicht der Inhalt der Souveränität ist beschränkt," *op. cit.*, p. 501, Against this view Laband remarked, *op. cit.*, p. 62, note 4, that Waitz failed to explain "wherein a limitation of extent differs from a limitation of content; both are identically the same."

viduals composing the State. If the former supposition were untenable, the latter at least met with general approval even though its validity was denied by Laband.

Waitz insisted strongly on the necessity for the mutual independence and separation of the central and member State governments, holding it necessary that both should be completely equipped with independent organs of government and able to fulfil all political functions. That the executive or head of the central State should be free from dependence on or control by any of the several States he deemed peculiarly important, since the former was to be regarded as the representative of the nation as a whole.

In general Waitz adopted the principles of the American Union as representing the federal ideal. He believed that there should be a senate composed of members from the several States as such, a national assembly directly elected by the people, and a central judiciary empowered to protect the constitutional rights of both parts and center. On the basis of the monarchical structure of the German States, however, Waitz inclined to the view that German federalism must rest upon a monarchical and not a popular foundation.

As, in its American form, this theory of divided sovereignty or, rather, of sovereignty limited to a certain sphere of activity, had been sharply assailed by Calhoun of South Carolina, so likewise in Germany it was subjected to the "particularist" attack of Max von Seydel of Bavaria. In the nineteen years before its demolition, however, it had gained the support of virtually all important thinkers, among its adherents, for the moment at least, being von Gerber, Ahrens, von Mohl and Heinrich von Treitschke. Of these and of the new writers who came into prominence in the last thirty years of the century, only one, von Mohl, was not converted by 1880 to the proposition that sovereignty was one and indivisible, and that there could not be two sovereignties over the same area or group of men.

#### THE INDIVISIBILITY OF SOVEREIGNTY

The event which marked the desertion of the theory put forward by Waitz was the publication in 1872 of Seydel's

article on "The Concept of the *Bundesstaat*."<sup>10</sup> He rested his attack upon Waitz on the ground that sovereignty was the natural and traditional attribute of the State; that, by definition, it was supreme and absolute power, and that, in consequence, it was inconceivable that two States should exercise sovereignty over the same territory—a thesis, the logical coherence of which, accepting its premises, made it indisputable. Waitz's assertion that sovereignty in federalism was limited in extent but not in content, Seydel neatly turned to his own purposes by saying that "it is exactly the content of sovereignty that it has no defined extent, just as the same is the content of property rights."<sup>11</sup> The whole of Seydel's federal theory is a development of Calhoun's comment—quoted by the Bavarian jurist with approval as laying down universally recognized principles—that it is impossible to conceive how the people of the several States can be partly sovereign and partly not sovereign, partly supreme and partly not supreme: "Sovereignty is an entire thing, to divide is—to destroy it."<sup>12</sup> But the Bavarian went even further than the American defender of States' rights: where the latter had admitted that the American Union was federal "because it is the government of States united in a political union in contradistinction to a government of individuals socially united," Seydel took the drastic step of proclaiming that the concept of the *Bundesstaat* was juristically untenable and worthless since, Statehood and sovereignty being inseparable, a State governing States, a sovereign above sovereigns, was logically inconceivable. "All the forms of States," he maintained, "to which one is accustomed to give the name *Bundesstaat*, must either be simple States or *Staatenbünde*";<sup>13</sup> that is, there could be no form of State

<sup>10</sup> "Der Bundesstaatsbegriff," first printed in the *Tübinger Zeitschrift für die gesamte Staatswissenschaft*, 1872, and later reprinted in Seydel's *Staatsrechtliche und politische Abhandlungen*, 1893. References below are to the latter volume.

<sup>11</sup> *Op. cit.*, p. 19.

<sup>12</sup> Calhoun, *Works*, 1851, I, 146. Cf. Seydel, *Kommentar zur Verfassungsurkunde für das deutsche Reich*, 1873, p. xii. As Preuss pointed out, the German parent of Seydel's doctrines was Pufendorf.

<sup>13</sup> "Der Bundesstaatsbegriff," p. 25. Zorn, while conceding the justice of Seydel's attack on divided sovereignty, comments in the favorite German

intermediate between the unitary State in full possession of sovereignty and a league of sovereign States which did not impair the absolute independence of its members.

As a deduction from this principle, Seydel argued that the constitution of any so-called federal State, such as Germany, Switzerland, or the United States, must be regarded as a treaty between sovereign States, binding in the first instance only upon the States themselves as such, and not upon the individual subjects of the States until after its promulgation by the States as a State law. In the German constitution he found, he said, no single expression to support the opinion that the several States had either intended to surrender their sovereignty or had in fact done so. All that had occurred in 1871, he maintained, was that the States in the Reich had clubbed together for the mutual exercise of certain sovereign rights (*Hoheitsrechte*), some States even reserving to themselves certain rights which the rest had agreed to exercise jointly. As a consequence he concluded that "the power of the German *Bund* is a power of the united States, but not the power of a State: it lacks the essential characteristic of that, unlimitedness. The individual sovereign rights which have been transferred to the *Bund* constitute no sovereignty. The *Bundesgewalt* works inside each State (*Land*) as *Landesgewalt*; the legislation of the *Bund* works inside each State as legislation of that State. Both derive their power not from themselves but only from the fact that the constitution of the *Bund* was proclaimed as law of the particular country. . . . Through proclamation of the constitution of the *Bund* as law, the local sovereign (*Landesherr*) bound himself in the exercise of his sovereignty in the same way that he did in granting his State constitution."<sup>14</sup>

Always Seydel came back to his central proposition that "either the whole is a State, in which case the parts are not; or the parts are States, in which case the whole cannot be a

phrase that in proceeding from absolute sovereignty to a denial of the existence of the *Bundesstaat*, Seydel "pours out the child with the bath"; *Das Reichsstaatsrecht*, 1880, I, 49.

<sup>14</sup> *Kommentar*, pp. 9-10.



State.”<sup>15</sup> Most difficult adequately to explain on this basis were the provisions in the three outstanding federal unions for the almost unlimited amendment of their constitutions by the central State without the unanimous consent of the member-States. Although it was from this possibility of constitutional amendment that other writers deduced the dogma of *Kompetenz-Kompetenz* which delivered sovereignty over into the hands of the central State, Seydel refused to let it stand in his way by declaring that it was merely a measure of expedience, dictated by the necessity of preventing the whims of any single State from interfering with the projects of the rest.<sup>16</sup> He admitted that this right of amendment might even be carried so far as to destroy the sovereignty of the States, but denied that this possibility was contained in the intention of the constitutional provisions, and saw a powerful safeguard against it in the difficulties constitutionally attendant upon amendments. At all events, he was very far from the view at one time held by Jellinek that, since the central State had an unlimited right to extend its competence, all the rights of the members must be regarded as derived from the center and dependent upon its continued auto-limitation in their favor. On the contrary he echoed Calhoun’s argument that the States could not have ordained a constitution over themselves: “the authority which ordains and establishes, is higher than that which is ordained and established; and, of course, the latter must be subordinated to the former—and cannot therefore be over it.”<sup>17</sup>

From the time of Seydel onward it was accepted as virtually axiomatic that sovereignty was one and indivisible and at least potentially absolute, suffering no restrictions to be imposed upon it from without. But, striking as was the success of Seydel’s criticism of Waitz from this negative aspect, his own attempt at a solution of the problems of federalism won him no followers whatsoever. The real or, at least, the juristic personality of the Reich and the importance of the powers which it exercised were too patent to admit of any

<sup>15</sup> *Staatsrechtliche und politische Abhandlungen*, p. 91.

<sup>16</sup> *Der Bundesstaatsbegriff*, pp. 38-39. Cf. Calhoun, *op. cit.*, pp. 138-139.

<sup>17</sup> Calhoun, *op. cit.*, p. 130.

widespread acceptance of a theory which confined personality and sovereignty to the several States alone.

Clearly, the sharply defined views of Seydel concerning sovereignty could be turned against his theory of federalism quite as easily as he had used them in its favor; that is, if Seydel could say that sovereignty inhered only in the member-States while the Reich was no more than a subordinate creation of the States, others might argue that the central government alone was sovereign while the former States composing it were mere autonomous provinces exercising delegated rights. A drastic attack of this nature upon the position of the States in the federal Empire was made by Jellinek from a purely juristic standpoint early in his career, but the onslaught upon him was so heavy that he was soon forced to retreat to a position less obviously in conflict with history and common sense. Even at this time, however, the Austrian jurist conceded the name of State to the members of the Reich in view of the considerable powers which they exercised, a concession the validity of which was denied by only a few writers such as Philipp Zorn and Joseph von Held.

### THE NON-SOVEREIGN STATE

Once the issue of sovereignty had been, for the moment at least, definitely settled by Seydel, this question of the status of the member bodies of the Reich came to be the topic of commanding interest. It was agreed virtually unanimously that sovereignty was the exclusive possession of the Reich and that this sovereignty was indivisible and, formally, potentially absolute; on this basis what fitting style and title might be found for the States which Seydel had found it possible to proclaim sovereign in the classic sense? The discussion which this question aroused may be seen from three different but closely related angles. In part it was merely a matter of verbalism—should a corporate territorial body exercising certain defined rights be called State or something else? Secondly, vital issues of political jurisprudence were concerned in the question as to whether the members of a federal union were to be regarded as independent States

exercising their own powers and rights or as mere provinces in a unitary State, largely self-administering and endowed with unusually wide spheres of competence. Thirdly, to lend heat to the argument, the whole complex of particularist and national pride and feeling was involved. As Hugo Preuss remarked, it was impossible that this controversy could be held on purely juristic grounds since the political issues invariably injected themselves and weighted down the balance in one way or another. To give a single instance: traditionally only the sovereign body merited the name of State; now the members of the Reich were, despite Seydel, assuredly no longer sovereign; but was it conceivable that the royal domains of, say, the kings of Prussia, Bavaria, and Saxony should lapse from the dignity of Statehood into the ignominy of being mere administrative districts?

Waitz had succeeded in retaining Statehood for the members of a federal union, but only at the expense of the unity of sovereignty; Seydel likewise had retained it, but at the expense of the independent existence of the central State. It remained for a champion to appear in defense of the idea of the non-sovereign State. This champion was Georg Meyer, who published his juristic views on the new German Constitution<sup>18</sup> in the same year as, but quite independently of, Seydel's *Bundesstaatsbegriff*. Far from being as rigid and precise a thinker as Seydel, Meyer was half inclined to accept Waitz's formulation of federalism and he was ready to concede that there might be such a thing as limited sovereignty, as, for instance, in the case of member-States to which special constitutionally guaranteed rights were reserved; but he broke with Waitz on the issue of *Kompetenz-Kompetenz*. The central State, Meyer admitted, had only limited sovereignty since a sphere of power and activity was left to the member-States, but he denied that this implied a like limited sovereignty for the latter. If any power existed, such as that of the central State, legally qualified to withdraw these rights of *Herrschaft* from the member-States,

<sup>18</sup> *Staatsrechtliche Erörterungen über die deutsche Reichsverfassung*, 1872. The preface is dated 1871 which puts Meyer beyond the possibility of Seydel's influence.

then the member-States, according to Meyer, "recognize a rulership over them even in regard to their reserved rights, and are thus no longer sovereign, not even limitedly sovereign."<sup>19</sup>

But although the member-States could no longer claim to be sovereign, Meyer conceded their just claim to Statehood. The conception of the sovereign State, as formulated by Bodin, he held to be applicable to the unitary State, but to lose its significance when federal systems reared themselves above hitherto sovereign States as the latter had risen above preëxisting smaller communities. Without defining precisely wherein the specific nature of the State was to be sought once sovereignty had been severed from it, Meyer argued that Bodin's type of State was only one of a variety of possible types: when sovereign States subjected themselves to a higher federal power they foreswore sovereignty but retained Statehood. In general Meyer held that juridico-political theory must not attempt to confine itself to too rigid categories and concepts, since all forms of political organization, great and small, sovereign and subordinate, were ultimately identical in nature and manifestations of the same evolving social life of man.<sup>20</sup>

As to precisely what the new criterion of the State should be there was little agreement. Habit, inclination, and the express phraseology of the Imperial Constitution sanctioned the use of the term "State," and juristic theory would have been left in splendid isolation in repudiating it. Despite some exceptions, the majority of the jurists did accept the solution offered by Meyer, but it proved by no means a simple matter to evolve a conception of the non-sovereign State which should, on the one hand, mark it off from the sovereign State and, on the other, distinguish it from all other corporate territorial bodies. To judge only from the great diversity of opinion that remained after several decades of discussion of the point, it may be said that no juris-

<sup>19</sup> *Ibid.*, p. 6.

<sup>20</sup> The verdict of Preuss, *Gemeinde, Staat, Reich als Gebietskörperschaften*, 1889, p. 27, is worth repeating: the value of Meyer's work "besteht nicht in der Durchführung, sondern in der Anregung, in der halb unklaren Verahnung fruchttragender neuer Gedanken."

tically satisfactory single criterion was hit upon which could not be destroyed with comparative ease by any other writer who chose to attack it in the light of the criteria which he himself had established.

The solutions proposed by Laband and Jellinek, which were in many respects very similar, are typical of the juristic thought of the period. As has been shown above, sovereignty for Laband represented the absolute independence of the State from any interference with its determination of its own competence; such independence as this was obviously not to be sought in the member-States of the Reich with their limited sphere of competence and express subordination to the central power. It was, however, present for the Reich itself in the superiority of its legislation over State legislation and in its right to amend the constitution by legislative action.<sup>21</sup> That the Reich was at any given moment not omnicompetent, Laband held in no way to interfere with the potentiality of omnicompetence which lent it its sovereign character. Deprived of *Kompetenz-Kompetenz*, the member-State lacked sovereignty but it still retained one feature which distinguished it from all other territorial associations—its own underived right and power to rule. In its own sphere Laband saw the non-sovereign State as an independent subject of underived public rights, exercising its own power in the tasks which it willed to perform. Save for the limitations upon the scope of its action by the center and its liability to constitutionally determined control, it was as much a State as was the sovereign center: "the member State is master, looking down; subject, looking up."<sup>22</sup> Thus

<sup>21</sup> Art. 78 of the *Reichsverfassung*, about which so much of the controversy raged, ran as follows: "Veränderungen der Verfassung erfolgen im Wege der Gesetzgebung. Sie gelten als abgelehnt, wenn sie im Bundesrathe 14 Stimmen gegen sich haben.

"Diejenigen Vorschriften der Reichsverfassung, durch welche bestimmte Rechte einzelner Bundesstaaten in deren Verhältnis zur Gesamtheit festgestellt sind, können nur mit Zustimmung des berechtigten Bundesstaates abgeändert werden."

<sup>22</sup> *Das Staatsrecht des deutschen Reiches*, I, 59. Laband, in fact, merely adhered to the doctrines which Gerber had laid down, eliminating the attribute of sovereignty as a necessary part of the *Staatsbegriff*, but retaining *Herrschaft* as the heart of it.

the criterion of the State for Laband, marking it off from all other real and legal persons, was its right of *Herrschaft*, that is, the right to command free persons to act and to forbear, and to compel their obedience to such commands. The State alone, he contended, ruled over men, rightfully disposing of their fortunes, their natural freedom and even of their very lives.<sup>23</sup> Other associations, in common with the State, had the right and duty of guarding and promoting the interests of their members, but none save the State had an undervived right to command and to coerce. In other corporations might be found an undervived right to impose obligations upon men, but the power to enforce the fulfilment of these obligations could be theirs only by grace of the State, a proposition strongly opposed by Gierke, Rosin, and Preuss. The argument that many local communities were older than the State and that the latter was built up from the former, Laband countered by the assertion that juristically they must be conceived as existing only through the will of the State, possessing no public power beyond that allowed them by the State for the performance of functions which it deemed necessary or useful.

Beyond this right of non-sovereign States to undervived compulsory authority, Laband found further evidence for his views in the fact—essential to all federal systems, according to him—that the member-States as such participated in the formulation of the will of the union. He saw them as “united in a commonwealth of a higher order. They are not subordinated to a ruler physically distinct from them, but, as States, to an ideal Person, whose substratum they themselves are.”<sup>24</sup> Yet the will of this ideal Person was one distinct from their own, a characteristic which distinguished the *Bundesstaat* from the *Staatenbund*. In the latter, Laband held, the several States retained their sovereignty with

<sup>23</sup> *Ibid.*, p. 69; *Archiv für öffentliches Recht*, II, 159: “Wenn man sagt ‘Der Staat herrscht,’ so hat man diejenige Eigenschaft vorgehoben, ohne welche man den Staat sich nicht vorstellen kann und welche andererseits ihm von allen anderen Subjekten der gesamten Rechtsordnung unterscheidet.”

<sup>24</sup> *Ibid.*, p. 61. Waitz, on the other hand, denied that the *Oberhaupt* or *Regierung* of the central State could be in any way dependent on the member-States; “Das Wesen des Bundesstaates,” p. 505.

the result that the will of the *Bund* could only be regarded as the will common to them all. In other words, the States entering into a federal union, in Laband's view, surrendered their individual sovereignty, but as a collectivity (*Gesamtheit*) received it back through their membership in the federal State.

One conception—that of the sovereignty of the people—which had helped to simplify the interpretation of federalism in the United States and Switzerland, was denied to Laband and the other German jurists by their insistence upon the dogma that sovereignty comes from above and not from below. While it might be held that sovereignty in the American federation rested with the people of the several States as forming one nation, *i.e.*, that sovereignty in the particular State inhered in the people of that State while the sovereignty of the center inhered in the national unity of the people of all the States; such a view was excluded from the outset in Germany. Not the sovereign people but the sovereign princes had joined together to form the Reich.

Almost alone Laband drew from the German situation the deduction that only the States as such were immediate members of the Reich, while their subjects became members of the Reich only mediately through them.<sup>25</sup> In other words, the center was sovereign over States, possessing the right of extending its competence at the expense of their powers; while the States ruled over individuals, commanding and compelling their obedience to commands. Laband conceded, however, that this was more a matter of formal principle than of practical usage, since the central government did in fact often come into direct contact with individuals.

From his three propositions that the Reich was made up solely of its member-States as such, that the collectivity of the States was sovereign, and that the highest power within the States was held by the rulers, Laband drew the inevitable conclusion that the bearer of the sovereignty of the Reich was the *Bundesrat*, the council composed of the instructed

<sup>25</sup> "The German Reich is not a juristic person of constantly increasing millions of members, but of twenty-five members"; *Das Staatsrecht des deutschen Reiches*, I, 97; cf. p. 137.

delegates of the princes and the senates of the free cities. It was this body, Laband held, which imparted the sanction to law and was hence to be regarded as exercising sovereignty.<sup>26</sup> He denied that the Reich could in any proper sense be considered a monarchy since the Kaiser could speak only in the name of the Reich or of the State governments in it, although he was empowered to act for the Reich and to represent it against third parties. For Laband as for the rest of his colleagues the Reichstag, the popular assembly, had little significance: the *Bundesrat* possessed the all-important sanction; the Kaiser executed the laws which had been sanctioned; and there remained for the Reichstag only the juristically inconsiderable function of concurrent action with the *Bundesrat* in the preparation of the content of law.

In these points of positive law Laband received a large measure of support from his colleagues, but the conception of "own rights of rulership" (*eigene Herrschaftsrechte*) which he had placed at the center of his federal theory as the criterion of the non-sovereign State was doomed to rouse endless controversy. It seemed indeed as impossible to arrive at a juristically adequate definition of the phrase as to find a formula to fit the admittedly existing non-sovereign State. It was subjected to attack from almost every angle. Materially, historically, politically, and juristically, it was demonstrated to be a concept more dangerous than enlightening. Where the line was to be drawn between original rights and derived rights, and whether rights which might be withdrawn from the possessor were to be regarded as original "own rights," were problems which the most juristic ingenuity was unable to solve.

<sup>26</sup> *Ibid.*, I, 97; II, 29 ff. Georg Meyer, *op. cit.*, pp. 43-44, sees the Reich as sovereign in the abstract, but desires a further concrete bearer of sovereignty: "Als Träger der Gewalt erscheint demnach in Republiken oder Staaten mit dem Princip der Volkssouveränität das Volk, nach deutschem Staatsrecht innerhalb der monarchisch regierten Einzelstaaten der Monarch und im Reiche die Gesamtheit der verbündeten Monarchen und Senate."

This was of course very close, as Laband pointed out, to Bismarck's view that "innerhalb des Bundesrathes findet die Souveränität einer jeden Regierung ihren unbestrittenen Ausdruck." The chief difference, was that Bismarck could afford to use the concept of sovereignty loosely for political ends, while Laband could not.



The degree to which interpretation on the part of the particular writer overbalanced the scientific-juristic aspect of the problems of federalism becomes clear in the work of Jellinek as compared with that of previous theorists. Waitz had seen sovereignty divided between center and parts, and Seydel had constructed the Reich from the contractual relations of the States. Haenel had destroyed the notion that the Reich rested on a contractual basis,<sup>27</sup> but had left the States a considerable measure of independent existence. Jellinek in his turn turned Seydel upside down and insisted, in his earlier days, that the member-States must be regarded as the creations of the central State.

Contrary to Seydel, Jellinek argued that it was the height of juristic folly to attempt to seek out the juristic origins of the federal State; a position which he defended in part by the simple proposition—to which Seydel would have given full-hearted support if for “State” had been substituted “monarch”—that, since the State must be regarded as the author of positive law it is impossible to find the origins of that State in a positive law then nonexistent. Through a treaty, Jellinek contended, a State might dispose of its whole personality as State, *i.e.*, obliterate its Statehood, but it could not by treaty transform itself into a non-sovereign State, at the same time setting up another and sovereign State above it. As far as its origins were concerned, the existence of a sovereign State, federal or otherwise, was, from the juristic standpoint, merely a fact given and no more.

It was from this premise that Jellinek set out on the false path of establishing the thesis, logically admirable but otherwise indefensible, that the parts of the federal union owed their life and powers to the center. Juristically, he contended, “only through the will of the sovereign State can non-sovereign States be constructed; the sovereign State is conceptually invariably primary, the non-sovereign sec-

<sup>27</sup> “Die vertragsmässigen Elemente der deutschen Reichsverfassung,” *Studien*, 1873, vol. I; a work of outstanding importance in shaping the future course of German federalistic jurisprudence.

ondary.”<sup>28</sup> Laband, with his doctrine of *Kompetenz-Kompetenz*, could easily regard the powers of the several States as a sphere which the sovereign center had not yet drawn into its competence, and thus consider these powers as original and underived. Jellinek’s auto-limitation, on the other hand, tended to place the whole of absolute power originally in the hands of the center which then proceeded to limit itself either by denying itself the exercise of certain sovereign rights or by conferring rights on other bodies. In consequence of this view, the non-sovereign State could inevitably be nothing but a creation of the sovereign and could have no other rights than those transferred to it by the latter.<sup>29</sup>

The criterion, corresponding to Laband’s “own rights,” by which the non-sovereign State was to be distinguished from the non-State territorial corporation, Jellinek held to be that the former was uncontrollable in the exercise of the rights with which the central State endowed it, even though these rights might be withdrawn again by the sovereign at any time. For Jellinek these rights were “own rights” neither in the sense that they could not be recovered by the central State at will nor in that they were original, but only in that no legal superior controlled or interfered with their exercise. “Only the State,” Jellinek insisted, “has this uncontrollable public law power”;<sup>30</sup> all other bodies to which the sovereign State has transferred public rights might make use of them only under the control and supervision of the State. Like all other juristic criteria of the non-sovereign State this suggestion that the distinctive feature lay in

<sup>28</sup> See *Die Lehre von den Staatenverbindungen*, 1882, p. 46. See p. 78 for Jellinek’s monumental early definition of the *Bundesstaat*.

<sup>29</sup> Jellinek quoted with high approval Lincoln’s dictum that “the States have their status in the Union, and they have no other legal status. The Union is older than any of the States, and in fact created them as States” (Lincoln’s first message to Congress). Jellinek commented upon this as being “the foundation and cornerstone of the constitutional law of every *Bundesstaat*”: *Staatenverbindungen*, p. 273.

That this theory is by no means defunct even now is indicated by W. W. Willoughby’s championship of it in his *The Fundamental Concepts of Public Law*, 1924. He asserts, p. 195, that the individual States were destroyed on entering the federal union: “They are re-created as bodies politic by the federal constitution. They are thus creations of the Federal State.”

<sup>30</sup> *Ibid.*, p. 40.

the possession of legally uncontrollable rights was soon disposed of by Jellinek's critics.<sup>31</sup>

Jellinek's contention that the member-State was juristically the creation of the sovereign center was, however, soon explicitly abandoned by him. In the work succeeding that in which he had put it forth he confessed that he had been led astray by the conception "that all sovereign rights actually inhered in the sovereign State."<sup>32</sup>

From that time forward Jellinek's federal theory pretended to a less degree of juristic precision. Like Laband he adopted the view that the rights of rulership exercised by the member-States were underived and original, although subject to confiscation by the central State. Thus sovereignty came to mean for him as well the potentiality of a totality of power, and not the actual possession or delegation of it. That the sovereign State could, by extending its competence, engulf all other rights and powers within the community did not, he held, in any way change the original and underived character of the rights which at any given time remained outside its sphere.

In the final statement of his views Jellinek set out from the proposition that the distinctive feature of the State was its possession of original and underived power to rule. The traditional identity of State and sovereignty he discarded as merely an historical accident, but the criterion of *Herrschergewalt* set up by Gerber he held to be essential. The extent of this power to rule at any given time he regarded as indifferent, but he maintained that "wherever a commonwealth (*Gemeinwesen*) is able to exercise rulership over its members and territory from original power and with original means of coercion in accordance with its own regulations (*Ordnung*), there a State is present."<sup>33</sup> Justly to claim the title of State, the commonwealth must be able to decide upon its own constitutional organization, which must rest upon

<sup>31</sup> See, for example, Bornhak, *Allgemeine Staatslehre*, 1896, p. 246; Rosin, *Hirths Annalen des deutschen Reiches*, 1883, pp. 277 ff.

<sup>32</sup> *Gesetz und Verordnung*, 1887, p. 204, note 19.

<sup>33</sup> *Allgemeine Staatslehre*, p. 490. "Der Staat ist die mit ursprünglicher Herrschermacht ausgerüstete Verbandseinheit sesshafter Menschen," *ibid.*, pp. 180-181.

its own power, and it must be equipped with all the organs of government—legislative, executive, and judicial—which appertain to the sovereign State. The non-sovereign State, in other words, must be so organized and so endowed with original power that, released from its position of subordination, it might immediately fulfil all the functions of a sovereign State merely by widening the constitutional sphere of its own competence. Furthermore, despite its lack of sovereignty, the non-sovereign State is, according to Jellinek, endowed with the same attributes of *Selbstverpflichtbarkeit* and *Selbstbestimmung* in relation to those original rights which remain to it as is the sovereign State in relation to its potential omnicompetence. "*Bestimmbarkeit* or *Verpflichtbarkeit* through its own will is the characteristic of independent power to rule," he wrote. "Hence legal power over its competence belongs to the non-sovereign State as well. But this power finds its limits in the right of the superior commonwealth."<sup>34</sup>

The *Bundesstaat* itself Jellinek defined as "a sovereign State built up from a plurality of States, the power of which is derived from the member-States bound together into State unity. It is a public law union of States which establishes rulership over the united States. The participants in this power are nevertheless always the States themselves, with the result that they at once rule as a collectivity, or at least share in rulership, and are on the other hand, taken singly, subjects in certain spheres."<sup>35</sup> As indicated in this definition, Jellinek contended that, from a strictly juristic standpoint the member-States were to be regarded as States only in relation to the body of powers which they exercised independently of the central authority. Where the rights possessed by the center were concerned the member-States were either eliminated entirely or became mere administrative bodies carrying out the commands of the center. Since ruling was, for Jellinek, the necessary, although not the exclusive, activity of the State, where it ceased to rule it lost its title

<sup>34</sup> *Allgemeine Staatslehre*, pp. 495-497.

<sup>35</sup> *Ibid.*, p. 769. For a brief statement of Jellinek's later theory of federalism, see pp. 769-787.

to Statehood: the member-State could be regarded as existing within the sphere of rights of the center only in so far as it had legal claims upon the action of the central State or was entitled to participate in the latter's rulership. But since the central State had the sovereign rights of *Kompetenz-Kompetenz*, there could be, according to Jellinek, no limit to the extension of its powers even if it should choose to do away with the existing federal system and convert itself into a unitary State.

### OTHER THEORIES OF FEDERALISM

The federal theories of Laband and Jellinek have been given in considerable detail above less because of their intrinsic merit than in illustration of the dominant juristic method in Germany and of the type of problem on which attention was concentrated. To anyone not trapped in the juristic scheme of things the results attained must appear little proportionate to the labor and ingenuity expended upon them. Granted the logical completeness of any particular system, the only grounds upon which it could be attacked lay in the preliminary assumptions on which it was based. The defense of the theory against attack rested ultimately on the assertion that the critic had set out from the wrong assumptions, or with the wrong intentions. If one writer appealed to history in defense of his theory that the rights of member-States were "own" rights while those of the center were derived, another might boast the indifference of jurisprudence to history in order to set up his counter-theory that the member-States were creations of the federal constitution, exercising delegated powers, while a third would maintain that it was the constitution itself which was at fault in terming "States" bodies that so obviously were mere self-governing provinces. By setting out with the proper definition it was only too easy to establish that sovereignty rested wholly on either side of the federal scale, that it was apportioned between the two, or that it was not to be found at all. Virtually any criterion that one wished could be set up as the distinctive feature of the non-sover-

eign State, be it *Herrschaft*, auto-limitation, or participation in the sovereignty of another State, so long as the definition excluded similar rights from other territorial bodies. Historical and common-sense explanations having been discarded as having no necessary bearing on those of jurisprudence, the juristic imagination was free to clothe the given facts in such mystery of legal form as might be desired.<sup>7</sup>

Of the remainder of German juristic theories of federalism only the more outstanding will be touched here, and those rather to indicate the points of conflict with Laband and Jellinek than in an attempt to reproduce the whole federal systems of the several writers.

The attack upon the Statehood of the members of the Reich met with little encouragement from the jurists; its chief exponent, Philipp Zorn, stood almost alone among his contemporaries. In the accepted manner Zorn set out upon his discussion of federalism with the distinction between the *Bundesstaat* and the *Staatenbund*, the former being a sovereign State personality, the subject of public rights; the latter, only a legal relationship, an association of independent States.<sup>36</sup> As Jellinek had at one time contended, Zorn continued to maintain that the States entering a federal union abandoned personality and sovereignty to the newly arisen central State, being rewarded by the return to them of a considerable share of the rights of sovereignty. It was by a process of auto-limitation that the sovereign center transferred these rights, Zorn held, arguing that since the center, by means of its power of *Kompetenz-Kompetenz*, could reclaim these rights whenever it so desired, they must be regarded as having been derived from it. If this potential omnicompetence gave sovereignty to the center, it no less deprived the member-States of it—and in so doing deprived them of the right, in strict usage, to claim the title "State," since they lacked "the primary essential of the concept of the State, sovereignty."<sup>37</sup> Since the corporate bodies com-

<sup>36</sup> *Das Reichs-Staatsrecht*, 1885, I, 50.

<sup>37</sup> *Ibid.*, p. 60. Cf. his "Streitfragen des deutschen Staatsrechts," *Zeitschrift für die gesammte Staatswissenschaft*, 1881, 37 Bd., p. 305: "Also

posing it were not States and since it might obliterate even such rights as were exercised by them, the *Bundesstaat* was in principle not to be differentiated from the unitary State, in Zorn's view. With the exception of his formal denial of the Statehood of the member-States, Zorn followed closely the general scheme of Laband. *Herrschen* was the outstanding and characteristic activity of the State, the sanction the juristically important feature of legislation. The bearer of sovereignty in the Reich was the collectivity of the united princes and the senates of the free cities. The Kaiser was not the bearer of sovereignty, but merely an organ of it; as King of Prussia he was one of the co-rulers.

A somewhat similar position was taken up by Joseph von Held who, writing in the same year—1872—in which Seydel's first important works appeared, concurred in Seydel's demand for the absoluteness, unity, and indivisibility of sovereignty, but insisted that in so far as the Reich, in what he regarded as its then unfinished form, had extended its competence as a State, the former States had become only "self-governing, territorial subdivisions."<sup>38</sup> Less explicitly than the Bavarian jurist he discarded the concept of the *Bundesstaat* as being only a temporary form mediate between the permanent forms of a plurality of unitary States on one hand and a single unitary State which has absorbed a number of others, on the other. The *Bundesstaat* as a continued phenomenon would be a contradiction in terms, since sovereignty is a postulate established by both reason and nature as a presupposition of the State, while the unity and indivisibility of sovereignty are attested by no less authorities.<sup>39</sup> From this standpoint the Constitution of 1871 marked merely a temporary halting place in the great development of the unity of the German nation; neither the Reich nor the member-States could be accounted fully rounded States, and

Staatscharakter und Souveränität sind identisch, denn Souveränität ist nicht nur *eine*, Souveränität ist vielmehr *die* Eigenschaft des Staates. Jeder Staat ist souverän und nur der Staat ist's."

<sup>38</sup> *Die Verfassung des deutschen Reiches*, 1872, p. 143.

<sup>39</sup> *Ibid.*, p. 19. He held it to be a truth of which ethics, reason, and nature were the guarantors that for one and the same territory and one and the same people there could only be one supreme power; p. 186.

it was left for the future to decide to which full Statehood and unlimited sovereignty would fall. Whatever the ultimate outcome, its present position could only be regarded as transitional and anomalous.

A third exponent of the view that sovereignty and State were inseparable was Conrad Bornhak, who, however, arrived at conclusions less rigid than the others. For him sovereignty was the classic right of the State to rule over land and people as the highest earthly power. "The rulership of the State," he contended, "is legally unlimited and illimitable. . . . Its right of rulership is the all-inclusive whole of all conceivable rights. . . . 'Through inner necessity the State is thus absolute, whatever its constitutional structure may be.'"<sup>40</sup> In applying this clear-cut theory to the federal State Bornhak found that neither center nor parts could lay claim to sovereignty, the latter because of their general subordination, the former because in the three chief federal constitutions of the day certain rights were guaranteed to the member-States which could be taken from them only with their consent. By definition there could be no division of sovereignty, but Bornhak conceived it possible that there should be a division of State power between two bearers of it such as to allow each to be termed "State," and yet not to have the true State, the possessor of sovereignty, appear except in the joining together of the two.

### THE *GESAMTSTAAT*

This latter composite theory was suggested early in the day by Albert Haenel and was later adopted, as will be seen below, by Gierke. Haenel set out from the conception of the State as the complete and self-sufficient community, possessing within itself all the instruments necessary for the maintenance of its life and activity. It was a postulate of the ethical nature of the State, he held, that it should be free to determine and work out its own Idea, that is, the nature of the State demanded for it the right of auto-determination of its competence. In the light of these broad presupposi-

<sup>40</sup> *Allgemeine Staatslehre*, 1896, p. 11.



tions Haenel found too limited the contention of Seydel and von Held that there could be no intermediate form between the unitary State and the contractual *Staatenbund*.<sup>41</sup> In developing his own theory of this intermediate form Haenel insisted upon the necessity of a threefold division of the elements involved in federalism: the single member-States, the *Gesamtstaat* or central State formed by the union of these, and the *Bundesstaat*, a concept which included both single State and *Gesamtstaat*. Hence, he wrote, "neither the individual State nor the *Gesamtstaat* is absolutely State; they are only political commonwealths (*Gemeinwesen*) organized and acting in the manner of States. Absolutely State is only the *Bundesstaat* as the totality of both."<sup>42</sup> In other words, the true State in a federal system is to be found only in the organized and harmonious joint action of the central State and the several members of the union.

Haenel did not, however, utilize this conception, which will be treated in more detail in relation to Gierke, to any considerable extent. For all practical purposes, he contended, if somewhat obscurely, the *Gesamtstaat* performs the functions which are attributed in theory to the *Bundesstaat*. That organic unity, he held, which is the primary presupposition of the concept of the State, is indeed to be found in the abstract in the *Bundesstaat*; but when occasion actually arises for the enforcement of that unity then it is the *Gesamtstaat* which steps forward. Thus the *Gesamtstaat* and the member-States are not to be regarded merely as coördinate authorities each with its own sphere of action, since in addition to its other functions the *Gesamtstaat* is also empowered to guard and further the interests of the whole. The distinctive feature of the federal State, according to Haenel, is not, as Waitz had claimed, that the sovereignty of the center and parts are limited in relation to each other, but is the loose organization of the whole which gives

<sup>41</sup> Haenel devoted much of his energy to the proof of the wrongness of Seydel's construction of the *Bundesstaat* by means of treaties between the States. It is interesting to note that Seydel regarded Haenel as "mein entschiedenste Gegner," *Staatsrechtliche und politische Abhandlungen*, p. 92.

<sup>42</sup> *Studien*, 1873, I, 63. Cf. Bornhak, *op. cit.*, p. 246.

the member-States functions which they are to fulfil as States in their own right and by their own laws, within the limits constitutionally established. Above them, to see that they keep within their legal bounds and to maintain the unity of the whole stands the *Gesamtstaat*, which, from this standpoint, is "not something different from the *Bundesstaat*, but is the *Bundesstaat* itself."<sup>43</sup>

Despite this conception of the *Bundesstaat*, Haenel's general construction of federalism was little different from that of most of his colleagues. The dogma of *Kompetenz-Kompetenz* filled the center of the picture. Having the right of *Kompetenz-Kompetenz*, the Reich, he held, was to be regarded as of the same nature as the unitary State: the whole sphere of State activity stood open to the central State of a federal union as it did to the unitary State since there were formally no barriers to the extension of its competence. To the objection that the right of the central State to absorb all power and competence is only latent or potential, Haenel replied that the unitary State also makes only partial use of its potentialities. Furthermore, *Kompetenz-Kompetenz*, he said, "is an actual right and actual duty of constant supervision of social cultural development and of constant readiness to intervene." Thus the Reich, although it might appear at first sight as only the *Gesamtstaat* was, according to Haenel's verdict, a State in the full sense of the word, and by no means to be regarded as inferior in power and scope to the most centralized of unitary States.<sup>44</sup> Thus, through the intrusion of sovereignty in the guise of *Kompetenz-Kompetenz*, there flickered out a promising interpretation of federalism.

Despite the obvious difficulty, if not the impossibility, of working the theory out satisfactorily, Haenel contended that it was not incompatible with his view of sovereignty that a State should remain sovereign despite almost any degree of control over it, granted that it was left in full possession of its exclusive right to the obedience of its subjects.

<sup>43</sup> *Studien*, I, 66.

<sup>44</sup> See his *Deutsches Staatsrecht*, §§135, 137. "Das Reich . . . ist der deutsche Staat schlechthin," p. 806.

In the *Bundesstaat*, however, Haenel contended, contrary to Laband but with the support of most of his contemporaries, the subjects stood in direct relation to the central power with the result that the sovereignty of the several States was sacrificed. The member-States of the Reich, he held, could not be considered as States in the customary usage of that term but only as member-States: all their rights and powers must be regarded as subordinated to the Reich, and hence, he concluded, "they have a status, a legal position, only within the Reich."<sup>45</sup>

A recognition of the possibility of a distinction, similar to that made by Haenel, between internal and external sovereignty also occurred in the later writings of Georg Meyer, whose early work in severing sovereignty and State has already been discussed. Meyer, however, went further than Haenel in making sovereignty a power divisible into its several fragments; that is, he held that a State might be regarded as sovereign in relation to any right in its possession which could not be alienated from it without its consent and in the exercise of which it could not be disturbed. The usual significance of sovereignty for him was the customary one of the supreme and independent rulership of a State; but he believed further that "sovereignty is also conceivable within a limited sphere and without *Kompetenz-Kompetenz*. For a community to be sovereign it is only necessary that the competences belonging to it cannot be withdrawn without its consent."<sup>46</sup> To the historical argument that sovereignty had always been conceived as absolute and that limited sovereignty was a *contradictio in adjecto*, Meyer replied that the usefulness of the concept was far from exhausted in its application to the absolute State in which it had been evolved. Furthermore, he contended, sovereignty in his use

<sup>45</sup> *Deutsches Staatsrecht*, §136.

<sup>46</sup> *Lehrbuch des deutschen Staatsrechts*, 4th ed., 1895, p. 19. Rehm, "Allgemeine Staatslehre," Einleitungsband, Abth. 2, of Marquardsen's *Handbuch des öffentlichen Rechts*, 1899, p. 60, comments that such rights cannot be considered sovereign or independent since the superior State endowed with *Kompetenz-Kompetenz* has the right to determine whether or not the lower State has exercised its rights within their proper boundaries. Meyer had, however, already admitted this in relation to federalism.

of the term was of great value in describing the interrelation of non-absolute communities to each other in cases where each possessed certain spheres inviolable by the other. Curiously enough, however, he did not extend this idea of a limitable but inviolable sovereignty to the member-States of a federal union. Since in the latter all rights, save those specially reserved to certain member-States, are potentially lodged in the central power because of its *Kompetenz-Kompetenz*, Meyer held that the center must be regarded as a sovereign State, and the members as non-sovereign States. In Laband's phrase, Meyer found the member-States to be subjects looking up and masters looking down. The criterion by which they were to be distinguished from all other lower political communities was their freedom in relation to their subjects to exercise their powers, within the limits set by the sovereign center, independently through their own political organization and under their own laws.<sup>47</sup>

#### THE STATE DEFINED BY ITS PURPOSE

Less juristically precise but of considerable interest were the essentially identical theories of the non-sovereign State put forward by Heinrich Rosin and Siegfried Bric. Both turned away—as indeed Jellinek and Haenel had also done in some measure—from the prevailing criteria, which rested chiefly on assertion and assumption, and sought the distinctive feature of the State in the scope of the functions which it assumed.

Against the accepted doctrine of *Kompetenz-Kompetenz*, Rosin argued that the solution of the problem of federalism was not to be found here since the method of determining competence was different in the three important federal States of the time, and the powers constitutionally allotted to center and member-States were far from identical in the three, yet all three were generally conceded the name of *Bundesstaat*. To escape from this dilemma, he adopted, as has been pointed out above, the definition of sovereignty as exclusive auto-determination: the Reich was sovereign, not

<sup>47</sup> *Lehrbuch des deutschen Staatsrechts*, pp. 7, 182-183.

because it had *Kompetenz-Kompetenz*, which might have been eliminated, but because there rested nowhere outside it the legal right of determining its will; the States were not sovereign because the content of their wills could be imposed on them by the Reich.<sup>48</sup> But this lack of sovereignty Rosin held to be the only juristic distinction between the Reich and the several States. The problem then became that of distinguishing the non-sovereign State from other territorial communities.

Rosin discarded the criterion of Laband and Jellinek—the possession of “own” rights of rulership—on the ground that these were also possessed by inferior bodies which acted in their own names and for their own purposes. For the *Herrschaft* of the State he substituted its purpose (*Zweck*), insisting that legal status could only be described in terms of aims. Legal personality, he contended, was the recognition by law of a life-purpose, endowed with the right to will the means of its own attainment. On this basis, “the purpose of a community (*Gemeinwesen*) is a legal concept, and in fact not merely one element of its rights, but that element which determines and runs through its whole legal existence,”<sup>49</sup> establishing the boundaries of its competence. Thus the distinctive difference between the State and the inferior community is to be found, not in the possession by one of *Herrschaft* and original rights, but in the different purposes upon which their personalities and rights are based. While the State, according to Rosin, is “the public law personality for the realization of national common ends,” the local community (*Gemeinde*) is “the public law non-sovereign collective personality for the satisfaction of local common interests.”<sup>50</sup> Every collective personality must have cer-

<sup>48</sup> “Souveränität, Staat, Gemeinde, Selbstverwaltung,” *Annalen des deutschen Reiches*, 1883, pp. 270-273. Borel, *Études sur la souveraineté et l'état fédératif*, p. 85, makes a valid protest against Rosin's theoretical elimination of *Kompetenz-Kompetenz*: “A federal State in which neither the members nor the central State have the right to change their competence, a State exercising suzerainty in which neither the suzerain nor the vassal can, for all eternity, modify their attributes, are not States; they are petrified rubrics, forms incapable of living or moving.”

<sup>49</sup> *Ibid.*, p. 289. Rosin freely acknowledges his debt to Ihering.

<sup>50</sup> *Ibid.*, p. 292. Rosin turned the customary doctrine upside down by

tain rights of rulership, but only the State can pursue national aims. The *Bundesstaat*, in this view, is marked off from the unitary State by the fact that its members, themselves States, share with the central State the duty of fulfilling national functions, but, since sovereignty inheres in the central State alone, there is no mechanical tearing apart of functions, but an organic interrelation.

For reasons which remain somewhat obscure the definition of the State as the public law personality realizing national ends was rejected by Brie as being too indefinite to be useful. In its place he proposed that the potential universality of the State's purpose should be accepted as the criterion of the State. In his definition, "the State is ideally a community of men for the subsidiary advancement of all reasonable interests of its (present and future) members."<sup>51</sup> In his favorite phrase, the State must be, in principle, all-sided. The ideal State, he held, would know no exceptions to the general interests which it would promote, and would be sovereign in the sense of being the supreme power in every sphere, but in actual historical fact Brie found the State to lag far behind this ideal postulate. At best this sovereign universality could only have reference to the relation of the State to the individuals contained within it, and not to its relations with other States. Hence the concept of sovereignty could not be accepted as the starting point for a theory of unions of States, such as existed in federalism. With Rosin, Brie held that many other communal personalities beside the State were possessed of their own rights which they exercised in the pursuit of ends which they had set for themselves, and that these could therefore not be made the criterion of the State. The distinctive feature of the State for him was that it was the only public personality which in principle enclosed the totality of human life within itself and could hence demand a national foundation for itself. But, he continued, "in the nature of the State there is no single asserting that every public personality had *Kompetenz-Kompetenz* in relation to its own ends.

<sup>51</sup> *Theorie der Staatenverbindungen*, 1886, p. 5. Brie's earlier historical work, *Der Bundesstaat*, 1874, did much to clarify the issues involved in the debate over federalism.

moment which would in principle exclude a legal limitation of the State's will in relation to other States."<sup>52</sup>

In the *Bundesstaat*, Brie found both center and parts to be real States, since, despite the sovereign *Kompetenz-Kompetenz* of the former, the latter were also left with duties and a sphere of competence which in principle included all sides of human life.<sup>53</sup> The true picture of the *Bundesstaat*, he contended, could be secured only by regarding it as 'at once *Bund* and *Staat*: it was to be seen as "on one side a federally organized community of associated States, and on the other side as a community of men associated together, with duties and competence in principle enclosing all purposes of human life."<sup>54</sup> In both aspects, according to Brie, the tasks of the central State are subsidiary; in the one it furthers all the interests of the several States, in the other all those of its individual subjects. As proof of the assertion that the functions of the central State were essentially subsidiary in character, Brie appealed to all modern federal constitutions to show that the powers of the center were definitively enumerated, including *Kompetenz-Kompetenz*, while "the essence (*Inbegriff*) of the sovereign rights of a State" remained with the member-States with only specific exceptions. Contrary to Rosin, he insisted that the *Kompetenz-Kompetenz* of the central State was essential to the *Bundesstaat*. As proof of his indifference to the rigidity of the conventional concept of sovereignty, Brie proclaimed the member-States to be sovereign in so far as they possessed specially guaranteed rights. Furthermore, he conceded complete sovereignty to Prussia in regard to all rights not actually within the competence of the Reich since she could prevent any constitutional amendment.

The juristic point of attack on the heart of the theories

<sup>52</sup> *Theorie der Staatenverbindungen*, 1886, p. 21.

<sup>53</sup> Jellinek, *Gesetz und Verordnung*, p. 204, note 18, called attention to the difficulties involved in Brie's assertion that both center and member-States were in principle all-sided: "Two States on the same territory with spheres of competence identical in principle are inconceivable since this theoretical all-sidedness of competence of both can never attain reality. Two States on the same territory with spheres of competence identical in fact have no possibility of existence."

<sup>54</sup> *Theorie der Staatenverbindungen*, p. 95.

put forward by Rosin and Brie was of course obvious. Led by Laband,<sup>55</sup> the jurists immediately raised the protest that the idea of determining legal status by means of the embodied purpose was juristically worthless, and that it was not only indefinite but that it betrayed an inability to define. From a strictly positivistic-juristic standpoint the validity of this criticism cannot be denied, and yet, on the other hand, not only was no other equally satisfactory criterion proposed from any other quarter, but it is also unquestionable that a jurisprudence of *Herrschaft* and form had much to learn from a doctrine of purpose and content.

### HERETICAL DOCTRINES

Apart from the orthodox theories of the *Bundesstaat*, which revolved round and round the same fixed points, there were a few notable heretics, such as Bluntschli, Treitschke, and Otto Mayer, who defended the view that the German Reich was of a different nature from other federal States and could not be placed in the same category with them. These divergent theories were usually based either on the monarchical foundations of the Reich as opposed to the republican structure of the other federations, or on the vast predominance of a single State, Prussia, or on both together.

The federal theory of Bluntschli on the whole followed the lines laid down by Waitz. In a federation, he held, there were both completely organized particular States and an independently organized common or central State. The power of the latter could not be left to any one of the particular States or to the assembly of States, but must have "its own federal or national organs which belong only to the collective body." In the Reich Bluntschli found three features which

<sup>55</sup> See: Laband, *Das Staatsrecht des deutschen Reiches*, I, 67; *Archiv für öffentliches Recht*, 1887, II Bd., p. 316. Laband maintained that the purpose of a legal institution lay outside the law and only served to confuse legal concepts. The accepted view was expressed by Werner Rosenberg, "Ueber den begrifflichen Unterschied zwischen Staat und Kommunalverband," *Archiv für öffentliches Recht*, 1899, XIV Bd., p. 360: the proposition that the State has as its purpose the advancement of all the interests of its members is "only a juridico-philosophical principle which has absolutely no immediate validity for positive law."



radically differentiated it from other federal States. In the first place, its organs, notably in the case of the Kaiser and the *Bundesrat*, were by no means distinct and independent, but were identical with the authorities of particular States. Secondly, where in true federations the member-States are weak in comparison with the union, even though differing in power and size, in the Reich "the kingdom of Prussia is much more powerful than all the other States taken together, and therefore must be considered as the chief and presiding authority upon which the Empire mainly depends, without which it is nothing, and round which the remaining German States are grouped." Lastly, the Empire itself and most of the States composing it were seen as monarchical. These differences, Bluntschli concluded, were so great as to make it advisable not to include the Reich under the usual category of federalism, but to term it a "Federal Empire," "and to regard it as a new and parallel form."<sup>56</sup> In general, however, Bluntschli adhered to Waitz's doctrine that the central and member-States were each sovereign in their own distinct and appointed spheres.

Treitschke also was at first a follower of Waitz in this phase of his theory, but he later adopted the view proclaimed by von Seydel that sovereignty must be one and indivisible, and that there could not be two sovereigns over the same territory.<sup>57</sup> On this basis, according to Treitschke, sovereignty is the exclusive possession of the central State, and in consequence the member bodies should, strictly speaking, be spoken of only as provinces or territories. But whatever the nature of the "normal" federal State, Treitschke refused to follow the political theorist—and "especially the jurist"—into the empty formalisms which overlooked the

<sup>56</sup> *The Theory of the State*, 3d English ed., 1901, pp. 269-271.

<sup>57</sup> See: *Historische und politische Aufsätze*, 1886, II, 113 (written in 1864); and "Bund und Reich," *Preussische Jahrbücher*, 1874, 34 Bd., pp. 519 ff. Treitschke clung to a rigid version of State and sovereignty which made the two inseparable: "Der Staat steht und fällt mit der Souveränität." "Der Staat," he wrote, "ist das als unabhängige Macht rechtlich geeinte Volk. Er ist Macht, berechtigt und befähigt seinen Willen gegen jeden anderen Willen mit den Waffen zu behaupten; er ist unabhängige, souveräne Macht, ausser Stande einem fremden Willen zu gehorchen"; *Bund und Reich*, p. 526.

real life of the State in contemplating the superficial resemblances of constitutional forms. Rather than seek out these resemblances, Treitschke set himself to find the fundamental differences between the Reich and the *Bundesstaat*.

Every *Bundesstaat*, he held, rested on the approximate equality of its members, but in Germany the one significant historical and political fact was the ever growing hegemony of Prussia. Where the process elsewhere had been the division of the greater States into smaller, more evenly balanced units, in Germany within little more than two generations 261 States had been absorbed by their more powerful neighbors, chiefly Prussia. The Prussian policy had been the double one of extending its own territory and of persuading the other German States to bow down to the federal leadership of the Prussian crown. "The stability of the *Bundesstaat*," he wrote, "lies in the equality, the strength of the German Reich in the inequality of its members." Prussia alone among the German States had not lost its sovereignty and was secured against its loss: Prussia, in short, according to Treitschke, under the headship of the national monarch, the King-Kaiser, was building up the unitary Prussian-German monarchy which should sweep away the obsolete divisions of *Kleinstaaterei* and the empty pretensions of *Kleinfürstenherrlichkeit*.<sup>58</sup> The Reich was no republican federation, but a national monarchy with federal institutions.

This view of the actual state of affairs in Germany before the Revolution was shared by Hugo Preuss, but where Treitschke was moved to lyric praise, Preuss found occasion only to condemn. Like Treitschke, Preuss found the similarity between the Reich and other federal States only a superficial one: Germany was not ruled by an independent central power established above a number of roughly equal States, but by a monarchical Prussia which had ingeniously concealed its hegemony under the constitutional forms of federalism. "Anyone who knew only the Bismarckian Constitution of the Reich," Preuss commented after the Revolution, "but not the pressure, open and secret, direct and

<sup>58</sup> Cf. *Bund und Reich*, pp. 533-549.

indirect, which the Prussian Government and the ruling interests in Prussia brought to bear in all directions, guessed nothing of the nature of this State."<sup>59</sup>

More moderate both in praise and blame, Otto Mayer too found the Reich difficult to include under the rubric of the customary *Bundesstaat*. Germany alone, he protested, built her federal State "on the basis of monarchy, and by no means the modern shadow monarchy—that could have been forgiven her—but precisely the most genuine full-blooded monarchy known to the present civilized world."<sup>60</sup>

The appearance of a new sovereign over republican States Mayer found easy to grasp: "the addition of several republican sovereigns by itself creates a new sovereign," the sovereignty of the people in the several States is superseded by the sovereignty of the whole people. But in a monarchy such a thing could not take place: "the addition of several monarchical sovereigns gives no new sovereign, but a league of monarchs";<sup>61</sup> and in Germany there could be no thought of looking to the people or the nation as sovereign. "*Germania*," said Mayer in an admirable phrase, "bears no Phrygian cap, but wears a garland of crowns in her hair."

And as witness to the justice of his conclusions that the German Reich was not founded on the same elements as the federal States of Switzerland and America, Mayer called upon the words in which Bismarck had explained the nature of the State that he had created. "The Reich," said Bismarck, "has its firm foundations in the *Bundestreue* of the princes. . . . The allied Governments are the Reich and the Reich consists of the collective allied Governments."<sup>62</sup>

<sup>59</sup> *Deutschlands republikanische Reichsverfassung*, 2d ed., 1924, p. 46.

<sup>60</sup> "Republikanischer und monarchischer Bundesstaat," *Archiv für öffentliches Recht*, 18 Bd., 1903, pp. 337-338.

<sup>61</sup> *Ibid.*, p. 364. This was the conception which had moved Bismarck and Laband to see sovereign power residing in the collectivity of the former sovereigns, i.e., in the "league of monarchs."

<sup>62</sup> Quoted by Mayer, *op. cit.*, pp. 370, 364.

## CHAPTER IV

### THE SCHOOL OF THE GENOSSENSCHAFT

THE most valuable heritage left by the jurists who have been discussed in the two preceding chapters was their extraordinary development of the analytical method. It is of course true that from one standpoint this very method itself limits their significance for the future since with the passing of the system of positive law which they were analyzing a great part of the content of their work loses all practical importance, but the tools with which they worked and which they refined to so amazing a degree are still serviceable for the jurist.

It is, however, undeniable that both their rigorous method and the material which they set themselves to master tended to enforce a certain sterility upon them. Their method confined them strictly to an analysis of a new and evolving body of public law in terms primarily of inherited concepts. It may be charged against them that, broadly speaking, any theory was acceptable to them if it afforded a means of bringing the (juristically considered) facts of the day into alignment with the concepts and theories of the past. That the new construction should represent as adequately as possible the real life underlying the superficial network of juristic facts was a conception to which they paid less than due attention. One must respect both the logical perfection and the schematic brilliance of many of the juristic systems of the first thirty or forty years of the Reich, but the feeling is inescapable that a great part of the ingenuity and labor expended might have been turned to more fruitful use in bringing jurisprudence into closer touch with the acknowledged realities.

In addition to this primary danger of the method, the classic German jurisprudence also suffered inevitably from the material with which it had to deal. In whatever direction

the political future of the world may lie, it is a safe assumption that hereditary monarchy possessing a plenitude of power in its own right will not again play any considerable rôle; yet it was with such monarchy that these writers had fundamentally to deal. Or, rather, they wrote in a transitional period, a period of vast economic, social, and political change, with the principle of hereditary monarchy still superficially intact in many, perhaps most, respects, but with a new world rapidly shaping itself behind the elaborate curtain of juristic changelessness. The State as Person and the prince as organ of the State were the dogmas of the time, but it is evident that these were merely variations of the dogma of absolute monarchy, as the German political systems themselves were at heart merely limitations of the still valid principle of a royal sovereignty derived, perhaps from God, perhaps from the State as Person, but certainly not from the consent of the people.

The principle of sovereignty was changing rapidly. Where the majority of the jurists fell short was in failing to see that the new era of the Great Society was dawning, or, in fact, had already dawned. Sovereignty is at its simplest when there exists a State in which a multitude of individuals is subordinated to the sovereign power of a single prince. While a sociological study of such a State will no doubt discover other powers than that of the prince, and will find limitations in fact upon his arbitrary legal omnipotence, still there remains a certain direct simplicity in the system which largely justifies the use of a simple concept of sovereignty. The moment that a greater complexity makes its appearance either in the political or in the social structure of the community, the simple concept of sovereignty ceases to have any but the most tortured application.

There can be no question that a full measure of complexity was the part of the German State after 1871. Even before that date the sovereign princes had been forced to share their power with the representatives of the people and the *Stände*. It has been shown above how the jurists "constructed away" these limitations upon the power of the prince by overstressing the formal element of the legislative

process.<sup>1</sup> The appearance of federalism complicated the problem still more, and inevitably made illusory any attempt to apply substantially unchanged the inherited simple concept of sovereignty. Only by means of a fiction which would hide the fact that there existed an essential division of power and function could the concept which had fitted the States of Louis XIV and Frederick the Great be used in relation to the modern German federal State.

Furthermore, the Great Society was swiftly coming into being and sweeping away the social foundations on which the older political and juristic theories rested. For a time, perhaps, it had been correct to say that the State consisted of "King and people," since the feudal and post-feudal alignments and groupings had largely broken down, but by the middle of the nineteenth century the term "people" could no longer mean the scattered and unorganized individual subjects of the prince. New alignments and new groupings had sprung up which made "Society" an element weighty enough to be bracketed with "State." A scheme of things which rested on the view that all power resided in the hands of the sovereign, who disposed of the public affairs of his subjects, could result only in a pathetic travesty of the new social and political reality.

The writers who have been discussed above were, broadly, attempting to reconcile their juristic inheritance with a new world that was only beginning to find legal expression. In disguising the new as adequately as possible in the juristic trappings of the old, the jurists were further hindered by the express stipulations of a method which allowed them to deal only with positive law: they could neither attempt the

<sup>1</sup> Laband, for example, *Das Staatsrecht des deutschen Reiches*, II, 29-30, states that "the sanction is the heart of the whole process of legislation; everything that precedes it in the way of legislation is only preparation for it, fulfillment of necessary conditions; everything that follows it is necessary legal consequence of the sanction, unalterably brought about by it." That Laband recognized this to be merely a formal construction is indicated by his admission elsewhere that "it is by no means a new truth that law is the expression of the social order and the popular legal outlook, and that laws which do not correspond to these requirements cannot have any extended existence." *Archiv für öffentliches Recht*, 1903, 18 Bd., p. 95. Cf. *Das Staatsrecht des deutschen Reiches*, II, 187.

philosophic universality of a Kant or Hegel, nor evaluate the given present in terms of a proposed future development.

Contemporaneous with these writers, though going far beyond them in vision, was a small group of thinkers who risked the breach with the concepts of the past in order to strike closer to the heart of the existing reality. From these men it is possible to strip the purely juristic and still have left a philosophic, social, and political system of the highest value; attempt to do so with the school of Gerber and Laband, and virtually nothing remains save an arbitrary framework of Bodinesque conceptions trimmed and twisted by innumerable hands to hold the new social and political life.

The new school, at the head of which stood Otto von Gierke, broke with the old on two essential points: in the first place it sought to build from the bottom up instead of from the top down; and in the second, in part as a consequence from the first, it sought to break away from the Roman and Romanistic conception of an exclusive antithesis between individual and State.<sup>2</sup> In illustration of this new viewpoint one cannot do better than to quote the words with which Otto von Gierke opens his massive *Das deutsche Genossenschaftsrecht*: "Out of marriage, the highest of the associations (*Verbindungen*) which do not extend beyond the life of the individual, grow families, clans, tribes, and peoples, communities, States, and associations of States in richly abundant gradations; and for this evolution no other limit is to be conceived than that sometime in the distant future the whole of mankind should band together in a single organized commonwealth, and thus give visible expression to the fact that it embraces only the members of a single great whole."<sup>3</sup>

<sup>2</sup> "According to the German and modern outlook, society does not exhaust itself in the State, but appears at the same time in a variety of other communities, each with its own life purpose: in the family, in the church, in the commune, in the association, in the international community." Gierke, *Deutsches Privatrecht*, 1895, I, 27.

<sup>3</sup> *Das deutsche Genossenschaftsrecht*, 1868, I, 1. The second volume appeared in 1873, the third in 1881, while the fourth and last was delayed until 1913.

It may be remarked here that it is impossible to give any precise Eng-

It is obvious that in a canvass of this magnitude, the concept of sovereignty can at best figure only as a subordinate element. Hugo Preuss, who brought the political implications of the Genossenschaft theory to their highest development in Germany, regarded the retention of the concept by Gierke and Heinrich Rosin as an illogical and dangerous concession to the ideology of absolutism and the juristic theories of limited constitutional monarchy derived therefrom. Sovereignty in its classic rigid omnipotence is as foreign in essence to the Genossenschaft, as is the Genossenschaft itself to the days of Louis' "*L'État, c'est moi*."

The actual politico-juristic construction of Gierke is, however, both less satisfactory and of less importance than the great work which he did in laying bare the manifold roots of the practice and theory of the Genossenschaft in the past, thus striking to the heart of the dominant Romanistic-absolutistic jurisprudence and preparing the soil for a radically new method of political and juristic thought. Were his fame to rest only upon the system<sup>4</sup> which he advocated in preference to those of Laband, Jellinek, Seydel, and their followers, it would be of little more permanence and universality than theirs, but this system is in fact to be regarded rather as an accidental by-product of the research which he cultivated with such genius, than as its goal.<sup>5</sup>

lish rendering of many of the terms commonly used by Gierke and his school. That which causes the greatest difficulty is, of course, the term "Genossenschaft" itself. Although the authority of Maitland, if not wholeheartedly—cf. *Political Theories of the Middle Ages*, 1910—stands behind the literal "fellowship," this term has little to recommend it since its connotation in English is almost wholly different from that of its German counterpart. Probably no single English word comes closer to the meaning of the original than "association," which has at least the virtue of being as broadly inclusive a term as is "Genossenschaft" itself. This rendering has therefore occasionally been substituted for the reproduction of the now more or less familiar German term in its original form.

"Gemeinde" has in most cases been rendered as "commune."

<sup>4</sup> For the systematic statement of Gierke's political and juristic views, see especially: "Die Grundbegriffe des Staatsrechts und die neuesten Staatsrechtstheorien," *Zeitschrift für die gesamte Staatswissenschaft*, 1874, 30 Bd., pp. 294-335; and "Labands Staatsrecht und die deutsche Wissenschaft," *Schmoller's Jahrbuch für Gesetzgebung*, 1883, 7 Bd.

<sup>5</sup> "Nicht sowohl in den Resultaten, als in der allgemeinen Idee und Anschauungsweise liegt die hohe Bedeutung Gierkes für die staatsrechtliche



As the foundation stone of Gierke's theory of the Genossenschaft stood his belief in the organic reality of human associations as persons: for him the corporative body is no less an entity and no less a person than the individual. His bitterest shafts were directed against the individualistic conception, derived in large part from the Latin tradition of the *persona ficta*, which held that the juristic person is a fiction set up by the law for definite ends. "In its crudest form," he argued, "the fiction theory explains the new legal subject (*Rechtssubjekt*) as an artificial individual which steps into being like any third party in complete isolation next to the associated natural individuals. As a mere concept-being, it leads a shadow-like existence, resembling the child or the incurable lunatic in its inability to will and act, and winning an artificial ability to act only through the natural persons who, like guardians, represent it."<sup>6</sup> Furthermore, the theory of absolutism allowed existence to these juristic persons only in so far as they were recognized by the State, and indeed their creation itself, by a further fiction, was commonly credited to the State. Between the absolute State, which created public law and was its sole original subject, and the individual, who was the sole original subject of private law, no other personality with an underived sphere of legal power might intrude.<sup>7</sup> The State was unique in its species, as the individual in his.

To this conception Gierke opposed what he considered to be the genuine traditional German view that every collective body (with the exception of the *Anstalt* or institution which is merely a legal relationship between a number of persons and has no true inner life or will of its own) was a real organic unity, bearing essentially the same relationship to the multiplicity of which it was composed as the whole organism to its parts or organs, and possessing an immanent purpose, will, and power.<sup>8</sup>

Konstruktion." Preuss, *Gemeinde, Staat, Reich als Gebietskörperschaften*, 1889, p. 40.

<sup>6</sup> *Das Wesen der menschlichen Verbände*, 1902, p. 5.

<sup>7</sup> The State as *fiscus* and all other juristic persons were conceived as merely fictions patterned on the natural individual.

<sup>8</sup> "Ihrer Struktur nach sind die Verbände entweder Körperschaften oder

"We start," he wrote, "with the historically established fact that man everywhere and always bore within himself the double characteristic of being at once individual for himself and member of a generic association (*Gattungsverband*). Neither of these characteristics without the other would have made man into man: neither the particularity of the individual nor his membership in the collectivity can be thought away without denying the nature of man. . . . For us the individual standing by himself and drawn into himself alone is a natural and real life-unit. But a life-unit just as natural and just as real exists for us in every human association which joins together a sum of individuals into a new and independent whole through a partial absorption of their individuality. . . . Thus there appears for us above the realm of individual existence a second independent realm of human universals. Above the individual spirit, will, and consciousness we recognize in a myriad of expressions of life the real existence of common spirit, will, and consciousness. And not figuratively, but in the true sense of the word do we speak of the 'common being' (*Gemeinwesen*) above the individual being."

### THE NATURE OF THE GENOSSENSCHAFT

The problem of the precise metaphysical nature of the entities comprising this second realm of human universals did not much concern Gierke. For the most part he was content with the repeated assertion of the "reality" of the corporation, a reality wholly comparable to that of the individual. Although the inner structure of the members of the two orders of existence—the social and individual—appeared to Gierke quite different, he was willing to class both under the generic heading of "living beings."<sup>10</sup> Correctly understood,

Anstalten, je nachdem sie als auf sich selbst beruhende und von einem immanenten Gemeinwillen beherrschte Gemeinschaften oder als von einem Stiftungswillen bestimmte Einrichtungen organisiert sind." Gierke, "Grundzüge des deutschen Privatrechts," in Holtzendorff's *Encyklopädie der Rechtswissenschaft*, 6th ed., 1904, I, 446.

<sup>9</sup> *Die Grundbegriffe des Staatsrechts*, pp. 301-302. Cf. *Das deutsche Genossenschaftsrecht*, I, 1-3.

<sup>10</sup> *Das Wesen der menschlichen Verbände*, 1902, pp. 15-16.

he argued, the comparison between the individual and the corporation "expresses no more than that we recognize in the social body the living unity of a whole made up of parts, such as we only observe otherwise in natural living beings."

The internal difference between the social and the individual person, Gierke found to lie essentially in the fact that while the latter was an immediate and tangible unity, the former was a whole built up through the binding together of living and independent beings. In other words, the members composing the corporative body are themselves separate persons, and the life of the whole and the life of the members stand in a juristic relationship to each other. Hence within every association is a network of what Gierke termed "social law" in contrast to the public law which orders the inner processes of the State alone. The *Genossenschaft* is thus not only subject to law in its external activities, like the individual, but is also controlled by law in its inner life.

A deeper analysis of this problem was made by the most notable of Gierke's disciples, Hugo Preuss, who in 1919 became in large measure responsible for the present German Constitution. In more decided fashion than his acknowledged master, Preuss drew a sharp line of demarcation between the physical and the moral organism. If the real and the physical organism were of necessity identical, and if no other type of organism were conceivable, he contended, then the analogy of the "social organism" would be too weak a foundation for the construction of a theory of State and society; but in addition to the real physical organism he found also equally real social organisms. In reply to Jellinek's accusation that he had failed adequately to define the term "organism," Preuss answered that the same charge was no less valid if brought against the scientists who spoke of the "natural organism." In the latter case as in the former, he insisted, the ultimate nature of that—life—which distinguishes the living from the dead, the organic from the mechanistic, was unknown. "With the resignation which is indispensable to every true science, one must accept precisely that last great 'x' as a given fact," and build on the recognized, if not satis-

factorily defined, difference between living organism and dead mechanism.<sup>11</sup>

For jurisprudence, however, it is not a matter of any great moment whether the association be conceived as an organism, as analogous to an organism, or as something of a different nature. A far more important point arises as to its juristic character and structure. Here Gierke and Preuss agreed in breaking completely with the Romanistic conception of a wholly separate corporation-person which is merely a fictitious individual incapable of acting or willing except through another person legally appointed to represent it. In this conception neither could see more than a cumbersome device calculated only to conceal the reality that underlay it. As they pointed out, the new fictitious juristic person is achieved only by thinking away the multiplicity which is its foundation. The organic theory, on the other hand, sees juristic personality as merely the legal expression of "the sociological fact that the organic unity of a general will has built itself up out of individual will particles."<sup>12</sup> The personality of the corporation appears, then, not as a new unit, independent of the members of the corporation, but as a unity built up organically through and out of the individuals who are banded together. It is a new and real personality, but it still includes the individuals composing it as its substance.

The moral personality of the *Genossenschaft* does indeed require recognition by the legal order before it has attained to legal personality, but there is a great and significant difference between the legal recognition which Gierke conceded to be necessary and the Romanistic conception of the creation of such personality by the State. From a legal viewpoint, according to Gierke, "the personality of an associa-

<sup>11</sup> "Über Organpersönlichkeit," Schmoller's *Jahrbuch*, 1902, 26 Bd., p. 575; cf. p. 596, note 1.

<sup>12</sup> *Ibid.*, p. 562; cf. pp. 580, 581. Gierke also made use of this construction and repeatedly refers to it as the basis on which the *Genossenschaft* is founded. See, for example, *Das deutsche Genossenschaftsrecht*, II Bd., p. 869: "Jede Genossenschaft setzt sich also aus einer Mehrheit von Personen zusammen, die mit bestimmten Stücken ihrer Persönlichkeit Theile der Genossenschaftspersönlichkeit geworden sind."

tion is the legally recognized capacity of a human association to be the subject of rights and duties as a united whole distinct from the sum of associated persons."<sup>13</sup> But the necessity of such recognition, he contended, does not degrade the association below the individual, since all legal personality, of individuals as well as of associations, is dependent upon recognition by the existing legal order. That such personality, historically considered at least, is not merely a necessary deduction from individual existence he illustrated by an appeal to the legal status of the Roman slave. "Primarily the basis of the existence of every German Genossenschaft lay in itself. It appeared like every individual as a morally free being living through and for itself and endowed with a will of its own, and it entered into the law in order to be recognized by the latter as a legal being."<sup>14</sup>

Thus the corporation, as conceived by Gierke, stood in a far more independent relationship to State and law than the Romanists were prepared to concede. A further difference between the two conceptions concerned the inner structure of the association. The Roman fictitious person required someone to represent it; the Genossenschaft, on the other hand, as itself a living and acting person, is in a position to speak directly through its own organs. The constitution of the association determines in each case which are the bodies or individuals qualified by its own inner law to speak or act, not for, but as, the association. When these bodies or individuals act within their competence as determined by the constitution they act as organs of the association; if they go beyond their competence the principle of *ultra vires* comes into play and their acts are legally unrelated to the association.<sup>15</sup>

The actual constitutional provisions of different associa-

<sup>13</sup> *Deutsches Privatrecht*, I, 469.

<sup>14</sup> *Das deutsche Genossenschaftsrecht*, II Bd., p. 867. For Gierke's discussion of the principle of recognition by law as a prerequisite of legal personality, see *Die Genossenschaftstheorie und die deutsche Rechtsprechung*, 1887, pp. 22-25.

<sup>15</sup> See §35, IV, of *Das deutsche Genossenschaftsrecht*, II Bd. The distinction which Gierke draws is that between *Vertretung* and *Darstellung*, a difference which cannot be rendered as easily in English as in German.

tions may, of course, differ very widely, but the usual organs will be a governing body or board of directors and a general assembly of the members. The latter, Gierke is careful to point out, is by no means to be regarded as identical with the association itself. It is not the association, but merely one of its organs. "The individuals," he states, "appear in it not because of an individual right, but because they have been constitutionally called together, and they transact business not as the bearers of independent individual wills seeking a contractual agreement, but as co-bearers of a common will seeking the construction and expression of a corporative decision."<sup>16</sup>

To associations built on these principles Gierke looked for a solution of many of the social problems of the present day. Only through them, he insisted, could the small landholder or handworker guard himself against the destruction with which the capitalist system threatened him. Isolated "economic units," as he termed them, are powerless to withstand the pressure put upon them by the forces of capitalism, but by combining their strength in friendly societies, credit associations, consumers' and producers' coöperatives, and trade unions, a new and closely knit social structure might be created which would ward off the dangers of the one-sided capitalistic development of our day.

### THE STATE AND THE GENOSSENSCHAFT

But, as has been indicated above, Gierke did not confine his conception of the Genossenschaft to associations within the State: the State itself is, from one viewpoint at least, only an expression, as are all other associations, of the social nature of man. From this extension of the conception of the Genossenschaft to include the State there arise a host of new and troubling questions about the nature of the State and its relation to its members, both corporate and individual. With the appearance of the association as a "public personality" and as a universal in relation to its own members, the unique position of the State tended to vanish and with it the

<sup>16</sup> *Das deutsche Genossenschaftsrecht*, II Bd., p. 883.

State's *a priori* claim to sovereignty. If the State were no more than one association among many, whence did it derive a rightful claim to sovereign power at once all-absorbing and all-creating? Once the opening wedge of pluralism has been inserted, how is unity under a single sovereign to be rewon?

Gierke's answer to this question is not wholly satisfying. His starting point is the separation of all territorial corporations from other varieties of the association. The State and the commune are at once Genossenschaften and more than Genossenschaften.<sup>17</sup> Not only does their territorial basis distinguish them from all other associations—although the Genossenschaft may also have a territorial element, as in an association to maintain dikes or sewers or a guild of the craftsmen of a certain area,—but they also contain an admixture of *Herrschaft* foreign to the nature of the Genossenschaft as such. These two elements—*Herrschaft* and *Genossenschaft*—he regarded as irreconcilable, although he acknowledged that the one often transformed itself into the other in course of time. State and commune, then, separate themselves off from all other associations because of their territorial basis and their rulership. And the State is to be distinguished from all other territorial associations by the fact that it is the highest and all-inclusive universality (*Allgemeinheit*). Every other association is a member of a higher association and is determined in its external relations by the norms of the latter; the State alone is member of no larger association and stands as a corporation without a superior, in short, is sovereign. Although not every State is a corporation—as, for instance, an absolute monarchy—every corporation “necessarily becomes State as soon as it is established as the highest and most inclusive association on a definite territory for the attainment of all human social ends.”<sup>18</sup>

The modern State—to reproduce Gierke's argument in his own words—“stripped of its mystical character and

<sup>17</sup> *Das deutsche Genossenschaftsrecht*, II, 829 ff., 865-866.

<sup>18</sup> *Ibid.*, II, 831. “Der Staat ist die Person gewordene höchstste Allgemeinheit.”

traced back through its natural growth (*Werden*) instead of to a supernatural origin, is not generically different from the narrower associations of public law, from the local communities and corporations, contained within it, but is related to them as the complete to the incomplete stage of evolution. It is the product of the same force which we still see daily on a small scale building up universals of a limited sort over particulars. It is thus homogeneous with the communes and associations. But great, to be sure, is the extent of the consequences bound up with the single difference that the State as highest universal has no further universal above it, is sovereign. Consequently, while all other associations are determined by something outside themselves, and find their ultimate regulator outside themselves, the State is wholly determined by itself alone and carries its own regulator in itself."<sup>19</sup>

It seems evident that here Gierke is giving an artificial solution to the problem by means of definition; in brief, that he is begging the question. The problem which must be solved is exactly whether the State, as we now know it, *is* universal, all-inclusive, and possessed of the highest power. Gierke's answer is that a territorial corporation which does possess all these qualities is a State, and is, in consequence, sovereign. The question as to whether such an all-inclusive and highest *Genossenschaft* exists in fact, as it does in the logical development of the *Genossenschaftstheorie*, appears not to have troubled him: he assumes its existence, calls it State, and sums up its qualities in the concept of sovereignty.

Let us take another instance of his reasoning in this respect—one to which Hugo Preuss raised the severest objec-

<sup>19</sup> *Ibid.*, I, 832-833. "Wir verstehen unter 'Staat' das höchste und umfassendste unter den sinnlich nicht wahrnehmbaren und doch mit geistigen Mitteln als 'wirklich' erkennbaren Gemeinwesen, welche die menschliche Gattungsexistenz über die Individualexistenz offenbaren. Dieses Gemeinwesen ist uns die dauernde, lebendig wollende und handelnde Einheit, zu welcher ein ganzes Volk sich zusammenschliesst." *Die Grundbegriffe des Staatsrechts*, p. 175. Cf. *Das deutsche Genossenschaftsrecht*, II, 41, 881 ff. *Die Genossenschaftstheorie und die deutsche Rechtsprechung*, 1887, pp. 152-153, 641-642.



tions.<sup>20</sup> Despite all uniformities there is a specific difference, Gierke argued, between the power-association (*Machtverband*) which is restricted by no similar power either externally or internally, and all other political associations. "For a power," he continued, "which is the highest, is distinguished from every other power by the specific attribute of being power through and through, the power absolutely (*die Macht schlechthin*); and a will to which such a power corresponds is distinguished from every other will as a sovereign, absolutely universal will, determined by itself alone."<sup>21</sup> The assumption of the existence of such a power, of such a will, is purely gratuitous. It is of little service to proceed from the assumption of this *Macht schlechthin* to the identification of its possessor as "State."

The State is then for Gierke the possessor of highest power and the greatest of social organisms. He saw it also, however, as possessed of a further attribute: it is the chosen organ of the community for the declaration of law.

These two concepts were for Gierke both essential to the modern State, and he emphasized at times the one, at times the other. Broadly speaking, it may be said that he sought to escape from the tradition of the State as being in essence power and to substitute the *Rechtsstaat* for it, but here and there throughout his works are scattered such Treitschkean lyric utterances as: "Power, compelling highest power, . . . is indeed the true substance, the not to be eliminated conceptual content and the world-historical value determinant of every State. Be the remainder of the State of Roman, Hellenic, Oriental, or German complexion, without power no State!"<sup>22</sup>

Usually, however, the validity of power was conditioned for Gierke by its legality. Excessive centralization of power in the State, he combated as being an outworn conception

<sup>20</sup> Preuss, *Gemeinde, Staat, Reich als Gebietskorperschaften*, 1889, pp. 130 ff.

<sup>21</sup> *Die Grundbegriffe des Staatsrechts*, p. 304. Preuss points out that there is an unbridgeable gap between "*die höchste Macht*" and "*die Macht schlechthin*."

<sup>22</sup> *Naturrecht und deutsches Recht*, 1883, p. 28. Cf. *Die Grundbegriffe des Staatsrechts*, p. 304.

which had already fulfilled its historical rôle, and suggested that the form of the question concerning local autonomy, should be not "How far is it expedient to grant independence?" but "How much independence is it necessary to sacrifice in the general interest?"<sup>23</sup> As motto for the *Rechtsstaat* he insisted that "*salus publica suprema lex esto*" must be converted into the proposition that although the public welfare was the positive content of the State's activity, the law alone could determine to what extent the public welfare might infringe upon private rights and duties.

Law and State, Gierke held to be contemporaries in birth and equals in dignity.<sup>24</sup> Neither without the other could hope to attain its fullest development. Even the sovereign power of the State is incomplete where the law has not transformed it into a legal relationship between subjects of reciprocal rights and duties; and law requires the power of the State at its back if it is to reach its full maturity. The State is the embodied common will (*Gesamtwille*) and stands not only as *fiscus* but as State wholly within the law which binds and limits it. In thus making law the rule of its life, the State is no more debased, according to Gierke, than is the individual who obeys the law: it ceases to be merely arbitrary power, but remains none the less a morally free being.<sup>25</sup> In like fashion, the law, without surrendering either independence or dignity, receives from the State that "highest power" which guarantees its most effective operation. The State is within

<sup>23</sup> *Das deutsche Genossenschaftsrecht*, I, 759. In general, Gierke sought the greatest possible local self-administration under the supervision of the State.

"The recognition that State and commune are identical in nature, even though the former thanks to its sovereign right can formally limit the legal sphere of the latter at its discretion, has in the last decades made the more progress because at present the one-sided view that the State concerns itself only with authoritarian (*obrigkeitliche*) rights while the commune is a purely economic corporation, the State rules, the commune handles economic affairs, has fallen wholly into disrepute." Keil, "Die Grundsätze des öffentlichen Rechts," *Archiv des öffentlichen Rechts*, 1891, VI Bd., p. 360.

<sup>24</sup> "Das Recht ist dem Staate ebenbürtig. Es ist so wenig vom Staat wie der Staat vom Recht erzeugt. . . . Gleich der Staatsidee ist die Rechtsidee mit dem Menschen geboren." *Die Grundbegriffe des Staatsrechts*, p. 310.

<sup>25</sup> See *Das deutsche Genossenschaftsrecht*, II, 41.

the law, and yet through its formal omnipotence is empowered to create law.<sup>26</sup>

The "creation" of law by the State, however, meant for Gierke only that the State in the course of its evolution and as the most inclusive and most powerful association had become the mouthpiece of the community for the expression of the latter's conviction as to what was law, and the guardian and arbiter of the law that it declared. If the State is the embodied general will, then law is the embodied general consciousness: outside of the consciousness of law, there is no law. "The law," he wrote, "is rooted in conviction. Its prescriptions are at heart the dicta of reason concerning the limits to which the will must submit in a just social order. . . . In its inner substance, law is not will"<sup>27</sup> but reason. If law were essentially will, it could only gain dominance over other wills by a preponderance of force; as reason, however, law exercises an immediate, if not infallible, control over the wills which it has to regulate. To the State as legislator falls the duty of declaring: "I will that this reasonable expression of the legal consciousness of the community have the universal binding force of law."

Thus the element of compulsion in law is reduced to secondary importance. Law is binding because it is rational and expresses the conviction of the community that such should be the norm of action; force makes its appearance only when these primary qualities have failed to produce their due effect. That law in its essence requires neither positive formulation by the State nor the might of an enforcer of its provisions Gierke illustrates by a reference to international law, the "law-character" of which he finds unmistakable.<sup>28</sup> Against Jellinek's auto-limitation Gierke argued that it pos-

<sup>26</sup> See *Johannes Althusius*, 3d ed., 1913, pp. 319 ff. Maitland writes of Gierke, *Political Theories of the Middle Ages*, p. xliii: "For him it is as impossible to make the State logically prior to the Law (*Recht*), as to make law logically prior to the State, since each exists in, for and by the other." It may be added that in Gierke's view neither exhausts itself in the other: the State is far more than a mere legal institution (*Rechtsanstalt*), and the law by no means limits itself to the State.

<sup>27</sup> *Das deutsche Privatrecht*, I, 116. See "Labands Staatsrecht und die deutsche Wissenschaft," pp. 77-79.

<sup>28</sup> *Die Grundbegriffe des Staatsrechts*, p. 181.

tulated the impossible limitation of one will by another, since, in the system of the Austrian jurist, both State and law were essentially will; while if law be reason, then the State as a rational (social) being is immediately bound by it without need of further ingenious juristic construction.

### SOVEREIGNTY AND THE GENOSSENSCHAFT

Where Gierke was on the whole content to use the old formulas in the new context, cutting out root and branch only such radically opposed theories as those of Max von Seydel, Hugo Preuss, accepting the broad foundations of the Genossenschaft theory, discarded virtually everything that had been done since the time of von Gerber, and began to build anew.

Nowhere had the difficulties attendant upon the effort to reconcile the inherited concepts with the new facts been more clearly demonstrated than in the innumerable solutions proposed for the problem of federalism, and it was upon this weakest link in the juristic chain that Preuss opened his attack. Gierke himself had come to the conclusion that the attempt to solve "the problem of the juristic construction of the federal State with the concepts carried over from the theory of the centralized State resembles that of the squaring of the circle"<sup>29</sup> but he had clung none the less to the concept of sovereignty which had been the alpha and omega of the theory of the centralized State, and made it indeed the nominal crowning point of his own political system. Preuss on the contrary saw in sovereignty the bitterest enemy of the Genossenschaft theory.

In order to make more easy the destruction of the accepted systems, however, Preuss gave to the term sovereignty a significance quite foreign to contemporary usage. As Haenel justly commented, "Preuss lends the word 'sovereignty' a meaning entirely different from that presupposed by the reader accustomed to the traditional usage of our literature. . . . His sense of the word is a purely subjective and wholly arbitrary terminology."<sup>30</sup> It has been pointed

<sup>29</sup> *Johannes Althusius*, p. 362.

<sup>30</sup> *Archiv für öffentliches Recht*, 1890, 5 Bd., pp. 468-469. Haenel further

out above that throughout the nineteenth century, sovereignty was constantly retiring from its older meaning and taking on instead the less rigid significance of auto-limitation, self-determination, or *Kompetenz-Kompetenz*. Preuss, however, saw in it only an "absolute power which lifts the will clothed with it to the position of a baldly universal and sovereign will."<sup>31</sup> Quite rightly he contended that sovereignty in this guise was incompatible with the existence of public or international law, but to attribute such a view of sovereignty to any of the leading contemporary thinkers was wholly unjustified. As Laband remarked, the fight against the theory of absolute sovereignty was a battle with windmills.

To this extent, however, Preuss's accusations were well founded: almost without exception wherever sovereignty made its appearance it demanded the center of the stage and masked the rest of the theory in its own image. Even in the mild form of *Kompetenz-Kompetenz*, there still lurked in sovereignty an undisguisable trace of personal omnipotence, and the theory which made sovereignty its essential presupposition was little likely to escape unscathed by it. "The theory of public law," as Preuss puts it, "has trapped itself in the web of the concept of sovereignty, like a fly in a spider's web."<sup>32</sup> The history of the theory of federalism, he remarked elsewhere, is marked "by a constant shifting of the place which is assigned to this concept. But wheresoever it may be placed, it always is the rock upon which the construction is shattered." He here neglects to note the changes in the concept itself in addition to the shifting of its place of application.

The first condition of any appreciable advance in modern remarks that the word "sovereign," from a philological standpoint, expresses merely a comparative conception, and is wrongly used to indicate a superlative or absolute. Cf. Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts*, 1920, p. 3, note 1.

<sup>31</sup> *Gemeinde, Staat, Reich als Gebietskörperschaften*, 1889, p. 133.

<sup>32</sup> *Ibid.*, p. vi. Preuss quotes (p. 91) with pleasure Zorn's comment: "Der Souveränitätsbegriff ist eine der grössten Verlegenheiten für die neueste staatsrechtliche Literatur geworden; nicht wegen der Konstruktion des Völkerrechts . . . sondern wegen der Konstruktion des Bundesstaatsbegriffs."

ern political theory Preuss held to be the elimination of the dogma of sovereignty which, however it might be modified and redefined, still carried with it inevitably the ideology of a world buried in the past. "Just as little," he contended, "as one can theoretically build up the absolute State on the principle of feudalism and feudal faith, can one arrive at the theory of the modern State through the concept of sovereignty. The feudal tie was the ideal foundation for the medieval feudal State, sovereignty was the central principle of the absolute State; for the construction of the *Rechtsstaat* a third, specifically different, principle is required."<sup>33</sup>

The absolute State was in fact and in theory unique in its species and permitted no independent political community to exist either within or above itself. Preuss, like Gierke, rightly insisted that the modern State was only one member of the long chain of collective persons that rose from the family to an ultimate international world community. The older theory he likens to the discarded scientific conception of the immutability of species: "the Genossenschaft theory is nothing other than the Darwinism of jurisprudence."<sup>34</sup> But Preuss believed the evolution of the social organism to have progressed further than Gierke would concede. The latter, although he thought the State only a historically conditioned resting place of that evolution, was firm in his conviction that for the present the State was the highest, most inclusive, and hence sovereign Person. In international law, he wrote, "the States are in every respect wholly absolute individuals and in no respect members of a higher universality. The whole of international law has throughout only the character of private law: it lacks all the conceptions, institutions, and guarantees which are presuppositions for the existence of public law." At the time at which he wrote he believed international law not to recognize even the legal possibility of an independent collective unity (*Gesamtheit*) over sovereign States.<sup>35</sup>

<sup>33</sup> *Gemeinde, Staat, Reich*, pp. 93-94.

<sup>34</sup> *Ibid.*, p. 234. Cf. p. 174.

<sup>35</sup> *Das deutsche Genossenschaftsrecht*, I, 843. Cf. Preuss, *op. cit.*, p. 180.

Two decades later (1889), Preuss asserted the indubitable fact that almost every time one glanced at a daily paper one found further proof that the modern State was only a highly dependent member of the great community of States (*Staatengemeinschaft*). "Out over the boundaries of States and Empires international law spins its threads, and the rudiments of international organizations begin to lift themselves above the mighty organisms of States and Empires."<sup>36</sup> In the constantly extending and multiplying international administrative bureaus and associations, he saw the clear outlines of the evolutionary development that should lead from the mere coexistence of absolute individual State-Persons to the world organism rising above these particulars and binding them together in a single great universal whole.

With the exception of this difference of opinion as to the present scope of international law, Preuss regarded law in virtually the same way as Gierke. By definition law was for him "the demarcation of the power of personalities to will"<sup>37</sup> and was coeval with the idea of the State, *i.e.*, with the appearance of a social organism standing above the individual. Law and State, he held, rendering each other invaluable mutual assistance and each enriching the content of the other, have evolved and perfected themselves together throughout the history of mankind. Legislation on the part of the State is no more than the declaration of latent law.<sup>38</sup>

Like Jellinek, he found a further and fundamental argument against the concept of sovereignty in its absolute usage in the fact that such a sovereignty would of necessity destroy the possibility of public law. Legal power is limited and conditioned power to will; sovereign power is illimitable and unconditioned; such "an absolute power, lifting the will clothed with it to be a baldly universal and sovereign will, cannot exist in the realm of law, since thereby would be negated the essentially limiting character of law."<sup>39</sup> Clinging to his absolute version of the term he proclaimed that

<sup>36</sup> *Gemeinde, Staat, Reich*, p. 207; *cf.* pp. 118 ff.

<sup>37</sup> *Ibid.*, p. 147. ". . . die Abgrenzung der Willensmacht der Persönlichkeiten."

<sup>38</sup> *Ibid.*, pp. 206 ff.

<sup>39</sup> *Ibid.*, p. 133; *cf.* p. 135.

Jellinek's auto-determination was in effect a denial of sovereignty since its exercise implied an act of auto-limitation which negated sovereignty's illimitability.

If sovereignty be taken as a wholly arbitrary omnipotence it clearly can find no place in the modern *Rechtsstaat* in which, in Preuss's words, "the bond which ties together all its parts, the individual and collective persons which are its members, into a higher organic unity is a legal bond (*Rechtsband*)."<sup>40</sup>

### A NEW THEORY OF FEDERALISM

Both Gierke and Preuss attempted to find a solution of the apparently insoluble: the problem of the juristic construction of the federal State. Neither, however, was able to hit upon the philosopher's stone which could alone blend all the conflicting elements in perfect harmony. From the non-juristic standpoint it is obvious that the Genossenschaft theory, recognizing the essential identity of State, local community, and corporation, offered a far more promising background for federalism than did a jurisprudence imbued with private law conceptions, and making sovereignty its center. Escaping the necessity of juristic precision, it need only view the member-State as a highly developed social organism exercising large autonomous powers within a higher, more inclusive organism. From local community to member-State to central State to international community is the logical and organic process of the inclusion of the lesser within the greater; but here the juristic criteria so dear to the legal mind are lacking.

As Gierke had made sovereignty the criterion of the State, his federal theory was necessarily largely occupied with the effort to distribute sovereignty adequately between center and parts, and yet retain it as sovereignty. It has been shown that the most distinctive criterion of the State, according to Gierke, was its "assertion of a highest will-power (*Willensmacht*), superior to every particular or common will." In other words, the territorial corporation pos-

<sup>40</sup> *Gemeinde, Staat, Reich*, p. 214.



essed of a sovereign will is a State. In order to build a successful theory of federalism on this foundation, one must succeed in finding a sovereign will to which all other wills are subordinated. With other presuppositions than those of the *Genossenschaftstheorie* this may be accomplished by a judicious use of fictions, but with the *Genossenschaft* as a starting point it is doomed to the failure which Preuss rightly predicted for it.

Gierke realized at the outset that, in any simple use of the terms, sovereignty could not be said to inhere either in the central State or in the member-States, yet it was equally obvious that the United States and the German Reich, for example, were as much sovereign States as France or Italy. In order to surmount this paradox—the existence of sovereignty and the nonexistence of a sovereign will or State—Gierke devised a solution according to which the “real” State was to be found only through the joint consideration of center and parts. Thus he wrote of the *Bundesstaat*:

“The State-quality (*das Staatliche*) is here divided. Only some of the rights of a State, be they many or few, are held by the federation itself, the rest are lodged with the united members. The whole and each member for itself as well are commonwealths of the order of State: but neither the whole nor the parts are fully State. The full concept of the State in the sense of the highest self-contained universal personality is realized only through the organic interrelation (*Zusammenfassung*) of the federal commonwealth and the member commonwealths.”<sup>41</sup> Thus, although sovereignty is an essential of the State, in a federal union three different types of States make their appearance: first, the non-sovereign members, then the non-sovereign center, and finally the sovereign combination of the other two elements. If Gierke ridiculed the gaunt “realism” of Max von Seydel, the latter would have taken equal pleasure in scorning the juristic metaphysics of Gierke.

As Preuss comments, Gierke’s version of federalism is, for

<sup>41</sup> *Das deutsche Genossenschaftsrecht*, II, 854. See also, *Labands Staatsrecht*, pp. 63 ff. As has been remarked above in the chapter on Federalism, similar theories were put forward by Bornhak and Haenel.

the conceptual grasp of the matter, "the most difficult and complicated of all attempted solutions of the problem." It is far from simple adequately to picture Gierke's third "full" State: he asserts that it is not to be conceived as a new State-Person standing above its component parts; he admits that it has neither organization nor organs, and it is not to be conceived as a mere sum; yet this shadowy structure is the real bearer of federal sovereignty.

Gierke's error, however, lies less in his mystical creations than in his failure to recognize that a radical breach with the inherited tradition of sovereignty was necessary. That the whole State in a federal union is to be found only in the joining together of all the parts which go to make it up is evident at the first glance. Federalism is nothing if it is not a division of powers: any attempt to locate the whole in that which is designedly only a part can succeed only at the expense of the root idea of federalism. Whatever the gibes of "realism," still the whole, where there has been a division and distribution, is to be achieved only by means of a new intellectual synthesis.

To attribute sovereignty in the traditional sense to this synthetic creation is, however, ridiculous, and it was here that Gierke fell short of his mark. Sovereignty, in his view, was the highest, most powerful will; that is, Gierke retained the doctrine of sovereignty which had been devised to fit the facts of personal absolutism. Where the sovereign is single as in absolute monarchy or where the sovereign is compound as in France or England, there it is possible to speak of a sovereign will which is superior to all other wills; but where the sovereign is the product of an intellectual synthesis, it is hopeless to try to endow it with an omnipotent will. The principle of sovereignty as opposed to the principle of anarchy is recognized in federalism, but there is no body endowed with a sovereign will, superior to all other wills.

Gierke's proposals were submitted to a grueling criticism by Preuss, but the latter's attempt to give juristic formulation to the facts of federalism was even less successful than that of Gierke. Since the ultimate result of his efforts was the destruction of the theory which he had labored to estab-

lish and the admission that federalism was incapable of strict juristic formulation,<sup>42</sup> it is not necessary to devote much attention to his suggestions. The scale and acuteness with which he conducted his critical and constructive operations dwarf his conclusions as to the distinguishing features of federalism and make them in fact almost irrelevant.

Setting out from the proposition that local community, State, and Empire should all be regarded as political commonwealths, the latter being a species of the genus "collective person," Preuss looked to the Genossenschaft theory to destroy "the spider's web of the antiquated and anachronistic concept of sovereignty and at the same time to grasp modern German structures in the modern German spirit."<sup>43</sup> The broad implications of this destruction of sovereignty and the substitution for it of the conception of collective persons or organisms were fully realized by Preuss, but from this mountain there issued only a mouse: the assertion that the juristic criterion of the State was its ability to change its territorial boundaries.

Commune, State, and Reich are all territorial political corporations; both the latter are able (or rather were able under the old Constitution) to preserve their territorial integrity and to alter their boundaries in their own right, while the former is at the mercy of its superiors. In this way Preuss had thought to solve the knotty problem of the juristic distinction between State and local community in federalism, but the solution was obviously inadequate and of merely temporary historical validity.

The fact of the matter appears to be that the problem is

<sup>42</sup> A carefully reasoned destruction of previous theories of federalism occupies the first section of Preuss's *Gemeinde, Staat, Reich als Gebietskörperschaften*. His repudiation of his own theories is apparent throughout his later works, as indeed in the Weimar Constitution itself. Cf. Chapter VI, "The New Federalism," where Preuss's more recent views are discussed. See note 44, below.

<sup>43</sup> Preuss asserted that the idea of a sovereign organism or sovereign person was a *contradictio in adjecto*, "denn während die präcis und rein erfasste Souveränitätsidee den Staat als einziges Wesen seiner Gattung allen andern Erscheinungen des Rechtslebens in absoluter Isolirtheit gegenüberstellt, betrachtet ihn die organische und Personentheorie als ein Glied in der grossen Kette der Organismen und Personen." *Gemeinde, Staat, Reich*, p. 174.

insoluble—certainly no single juristically satisfactory criterion can be discovered which will infallibly mark off from each other the three chief territorial units entering into federalism. The opportunistic elasticity of the three terms—*Gemeinde, Staat, Reich*—must be clearly apparent to anyone who has glanced through the literature of the three most recent political and historical phases of German development: from 1815 to 1871, from 1871 to 1918, and from 1918 to the present. No doubt the best that one can accomplish is some such general statement as that that body will be known as State which has the historical antecedents of a State, or has been created in the image of such a State, retains a large degree of autonomy, has the political organization of a State, and performs political and social functions analogous to those performed by the independent State.

The abandonment of his theory was accomplished by Preuss himself in his defense of the new Constitution of 1919. In his chief work on the Constitution, Preuss remarked that whole libraries had been written on the problem of federalism but that no satisfactory solution had yet been put forward. "For," he added, "where there is nothing, even the acuteness of German erudition can find nothing. Member-State in federal State and autonomous self-administrative body in decentralized unitary State are historico-political forms of State organization, gradations of centralization and decentralization which in historical reality show many differences in degree, but between which no conceptual difference in nature is to be found, because it does not exist."<sup>44</sup>

## POLITICAL THEORY AND THE GENOSSENSCHAFT

Criticism of the political implications of the Genossenschaft theory as developed by Gierke and Preuss concen-

<sup>44</sup> *Deutschlands Republikanische Reichsverfassung*, 2d ed., 1924, p. 43. "The traditional opinion which links up the idea of the 'State' with the inviolability of its territory is still strongly effective. It only draws back step by step before the realization that today such a position belongs to the Reich alone, while the boundaries of the *Länder* can and must be determined from the standpoint of administrative efficiency." *Artikel 18 der Reichsverfassung*, 1922, p. 10. Cf. Jos. Lukas, *Die organisatorischen Grundgedanken der neuen Reichsverfassung*, 1920, pp. 18-19.

trates itself upon three chief points: the nature of the group or Genossenschaft, the political importance of the non-territorial association, and the principle of the recognized authority of the more inclusive association.

To deal with the first and more obvious of these points, it must be admitted at the outset that the purely individualistic, contractual explanation of the association is no longer acceptable, more especially if this takes the form of asserting that the personality of the group is only a juristic fiction conceded by the State. The State obviously is not, and must not be held to be, the creator and determining force of the life of the group—a thesis which assuredly requires no detailed defense at the present day. But it is far from obvious that the refutation of the purely individualistic theory leads on inevitably to the ascription of real personality to the group, in the sense in which the individual is the possessor of real personality. We must concede with H. J. Laski that “corporate personality, and the will that it embodies, is real in the sense that it makes those upon whom it acts different from what they were before,” but likewise it seems inescapable that this corporate personality “remains different from the uniqueness which makes me separate from the rest of the universe.”<sup>45</sup>

To determine the ultimate nature of that remaining difference is a problem rather of metaphysics than of political theory, and one which is beyond the range of certain solution: we are given the fact that the group, taken dynamically, is a force, a process, in a sense a vital unity—at all events something other than a mechanical aggregate of disparate individuals—but at the same time we are inevitably aware that this unity or force is of an order different from that of the individual. Undeniably the corporation possesses personality, but it is not the personality of the individual. Apart from metaphysics the solution must be sought in psychology if anywhere since the unity, such as it may be, is assuredly of the psychological rather than the physiological order. Perhaps the solution is to be found rather in the sug-

<sup>45</sup> *A Grammar of Politics*, 1925, p. 32. Cf. Maitland's Introduction to *Gierke's Political Theories of the Middle Ages*, pp. ix ff., xli ff.

gestion of Ernest Barker than in those of Gierke and Preuss: the identity of the State "resides not in any single transcendent personality but in a single organizing idea permeating simultaneously and permanently a number of personalities. As for the State, so for all fellowships; there may be oneness without any transcendent one. . . . We may be content to speak of associations as schemes in which real and individual persons and wills are related to one another by means of a common and organizing idea."<sup>46</sup>

But whether one regards the association as Person or as Idea probably little changes the content of the resulting political and social theory, unless either be pushed to the extreme of, say, the full-blooded organism theory on one hand or a theological metaphysic on the other. More important in the practical applications of the views of Gierke and Preuss is the relatively unimportant position assigned by them to the non-territorial association. Although the theory had arisen chiefly in response to the vast increase in corporate activity in the latter half of the nineteenth century<sup>47</sup> both Gierke and Preuss assume virtually without comment that associations lacking the territorial basis are inherently inferior, from a political standpoint, to the territorial units which, nominally, at least, include them. That the authority of the territorial association, notably the State, is constantly being challenged in fact and in theory is matter of common knowledge. Furthermore, it is at least

<sup>46</sup> "The Discredited State," *Political Quarterly*, February, 1915, pp. 111, 113.

<sup>47</sup> Cf. *Das deutsche Genossenschaftsrecht*, I, 652 ff.; *Genossenschaften*, Holtzendorff's *Rechtslexikon*, 1875, I, 671-672.

The *Genossenschaftsidee*, as Gierke insisted, went back through German history to the very earliest days, but the occasion of its recrudescence was the sudden burst of corporate development. From a less juristic standpoint than that of Gierke, Kurt Wolzendorff has run through the history of the *Genossenschaftsidee* in relation to the German State. According to him the true German conception of the State has always been *genossenschaftlich*. Of the *Genossenschaftsidee* he remarks: "In diesem Gedanken ist aber die Antithese von Volkssouveränität und Fürstensouveränität überhaupt nicht möglich, weil es nur *ein* Prinzip gibt: das der Gemeindlichkeit als rechtlich-politischen Massstabes aller Macht, aller Pflicht und aller Befugnis"; "Zur Psychologie des deutschen Staatslebens," *Zeitschrift für Politik*, 1919, XI, 456. Cf. *Vom deutschen Staat und seinem Recht*, 1917.

arguable that the central authority in a federal or international system—two types of political organization which must bulk large in the future—contains a considerable non-territorial element. Political theory of the twentieth century can no longer, due to a variety of causes, make the assumption that authority rests in the lap of the territorial unit without further question, even though it be held desirable to have such a foundation for the authoritarian hierarchy.

Partially involved in this failure of the Genossenschaft theory to recognize the importance of the non-territorial association is the further assumption of Gierke and Preuss that the logical inclusion of the lesser unit within the greater will of itself bring with it a ready admission on the part of the former of the superior political rights of the latter. In this connection it is interesting to look back to the early German maxim that "city law breaks province law, province law breaks common law" (*Stadtrecht bricht Landrecht, Landrecht bricht Gemeinrecht*), on which Savigny comments that in determining a case of conflict of laws where one is more inclusive than the other, "the simple rule holds that that law always has preference to which is to be ascribed the most limited extent of validity."<sup>48</sup> But it is obviously unnecessary to delve far into the past in search of instances of the defiance, both unsuccessful and successful, of the larger unit by a physically included group. The theory of concentric circles of authority with the greater always determining the actions of the lesser is, no doubt, schematically ideal, but its practical applicability is conditioned by the degree of authority or allegiance which the greater can at any given moment command through the realization by the lesser that its interests and ideals are included in the scheme of life of the former. In the light of the recent past it is scarcely possible to concur with Gierke in his judgment that the modern associative spirit has escaped the danger of emphasizing particularity at the expense of universality or of building States within the State. The modern corporation, he argues, finds a strong and fully developed State already in existence and although the former has a tendency

<sup>48</sup> *System des heutigen Römischen Rechts*, VIII, 22.

to prevent overcentralization in the latter, it has no tendency to weaken the idea of the State and "readily finds the boundaries and limits of its own realm in the power embodiment of that idea,"<sup>49</sup> a proposition of which, perhaps, Gierke was more trustful at the time it was written than he could have been fifty years later.

### Note

The attack on sovereignty which played so large a part in the theories of Preuss was carried on from a somewhat different standpoint by Hugo Krabbe, a Dutch jurist, who was considerably influenced by the Genossenschaft school, in his *Die Lehre der Rechts-souveränität*, 1906, and *The Modern Idea of the State*, 1922 (trans. by G. H. Sabine and W. J. Shepard). With Preuss, Krabbe attacks the traditional view of an established sovereign authority independent of law, and from which law is derived. For this conception Krabbe suggests the substitution of the idea of law itself as sovereign. While in other days personal authority may have been the source of law and even, in a sense, of the State, the modern idea of the State, Krabbe held, rests on the proposition that power is derived from the law and from the law alone. To the argument that law was in essence the command of a superior, he replied that on the contrary law was no other than a group of norms built about certain human purposes; legislation in this view became the weighing of the social values of conflicting purposes. While he did not deny that the maintenance of these norms required the coercive force of the State, he contended that this right of coercion was derived from the law and was in fact to be regarded only as the law administering itself. In the last analysis, however, law does not rest for Krabbe on force but on the legal conviction (*Rechtsüberzeugung*) of the people. His theory may be summed up in his assertion that "a spiritual power has taken the place of a personal authority."

<sup>49</sup> *Das deutsche Genossenschaftsrecht*, I, 655.



## CHAPTER V

### THE PHILOSOPHICAL JURISTS

THE beginning of the twentieth century witnessed a marked and significant return in German jurisprudence to the circle of ideas which had characterized the beginning of the nineteenth. Materialism and empiricism began to give way to the assaults of idealism and philosophic criticism. The same general trend was visible in every field of thought, and philosophy came again to take its place as at once the crown and the foundation of all human speculation. With the rallying cry of "Back to Kant" and "Back to Hegel" whole new schools sprang up in opposition to the era of positivistic materialism that had lasted for more than half a century.

The 'thirties and 'forties of the last century had seen the gradual dying out of the great flames of philosophy. Hegel proved the culminating point of the great movement. The successors of Hegel divided against themselves into a theological right wing and a materialistic left. With the minor exception of the school of Krause the one important philosophy of law between Hegel and the close of the century was that of Stahl which, however, proved of practical rather than philosophical significance. As throughout the realms of science, in jurisprudence empiricism held almost uncontradicted sway. Philosophical speculation gave way to an historical positivism absorbed either in the "preparation for the judge of the law currently in force or in the digging up of law long since extinct; its second task of pointing out the way for the legislator through the evaluation of the existing law and setting up a righter one it left out of consideration."<sup>1</sup>

<sup>1</sup> Gustav Radbruch, *Einführung in die Rechtswissenschaft*, 2d ed., 1913, p. 81. He continued to remark that the recent developments in the social sciences and the general change in social outlook had "forced the law to abandon its self-sufficient isolation and take its place in the system of social means and ends."

Kant and Hegel were the two great forces in the classic age of German philosophy. It was natural that they should become the sources to which a generation spiritually starved on a diet of positivism and hungry for philosophy should return. This new generation lamented that their fathers had been so filled with enthusiasm for the law that they had neglected the problem of what was just. The System, to which reference has been made in earlier chapters, forbade even the most hesitating glance beyond the spheres of positive law: law was given as such by the sovereign, the State, and the whole duty of the jurist was to construct with the aid of such concepts as were necessary the logical system of those positive norms. Natural law was anathema and the philosopher a disturbing intruder.

But for a variety of different reasons the era of analysis left the inquiring German mind unsatisfied. The reaction against it divided broadly into the two paths of Neo-Kantianism and Neo-Hegelianism. The former when it held most firmly to Kant was occupied almost wholly with criticism, with the problems of epistemology, with the nature of law not as a cultural phenomenon but as an independent system of thought to be evolved from the *a priori* categories of the mind.

The Neo-Hegelians, on the other hand, attacked empiricism on the grounds that really to understand law one must get outside it and see it as only one phase of cultural development. Where the Neo-Kantian Hans Kelsen, for instance, makes his fundamental principle the theory that law can never be derived from anything other than law, that the metajuristic problems are outside the province of jurisprudence, the Neo-Hegelian Josef Kohler insists that the whole problem of law rests on the determination of its relation to the general culture which it serves. The basic distinction is that the one school is interested primarily in the discovery of how law can be known and thought, the other in what law is and must be to fill its proper place in the whole scheme of human life.

The basis of the Neo-Hegelian attack on positivism may be found in Kohler's remark that "if one law were the same

as another, one would need no legislative deliberation whatsoever, but it would suffice to throw the different legal possibilities into a lottery urn and pull out one or the other; thus far goes positivism, and indeed every construction of law which turns away from the philosophy of law."<sup>2</sup> For the Neo-Kantians, too, the positivistic assumption that law was the body of norms laid down or enforced by the sovereign was wholly unsatisfactory since it failed to provide the formal and independent conceptual unity necessary to law as a separate sphere of knowledge.

This return to philosophy was accompanied by another movement of considerable practical effect which also had as its goal a breach with the notion that the sovereign could and should be the creator of a complete and perfect system of legal norms. This movement, carried on by a number of jurists constituting what is known as the "Free Law School," argued on one hand that the actual content of law was in fact largely determined by the judge (and occasionally by other factors) both where legal prescriptions were lacking and where their particular application was dubious, and on the other that this creative function of the judicial bench should be formally recognized and extended since it was essential that statutes be adapted and interpreted in accordance with changing social needs.<sup>3</sup>

In this as in the whole philosophical movement there is

<sup>2</sup> Josef Kohler, "Rechtsphilosophie und Universalrechtsgeschichte," in Holtzendorff's *Encyklopädie der Rechtswissenschaft*, 7th ed., 1915, I, 6.

<sup>3</sup> Of interest in this connection are the writings of Josef Kohler and Gustav Radbruch, Eugen Ehrlich, *Freie Rechtsfindung und freie Rechtswissenschaft*, 1903; Gnaeus Flavius (H. U. Kantorowicz), *Der Kampf um die Rechtswissenschaft*, 1906; and Fritz Stier-Somlo, "Das freie Ermessen in Rechtsprechung und Verwaltung," in the *Festschrift für Laband*, 1908, Vol. II. Kantorowicz speaks of the movement as constituting the reappearance of natural law in changed form. A factor of undoubted importance was the appearance in 1900 of the *Bürgerliches Gesetzbuch* which naturally tended to solidify the hitherto more fluid development of law, but the roots of the movement reach considerably further back than this.—Cf. Kohler, *Recht und Persönlichkeit in der Kultur der Gegenwart*, 1914, pp. 24 ff.; O. Bülow, *Gesetz und Richteramt*, 1885; Rudolf Stammler, *Rechts- und Staatstheorien der Neuzeit*, 1917, §18. Stammler's work in general played a considerable rôle, and in particular his conception of *richtiges Recht*. Cf. Kantorowicz, *Zur Lehre vom richtigen Recht*, 1909, p. 10; Pound, "Sociological Jurisprudence," 25 *Harvard Law Review*, pp. 147-154.

more than a sign of a return to the concept of natural law. The mere fact that one undertakes the evaluation of positive law in terms of some law which is considered higher and better is, broadly, an indication of a partial return to the principles of the seventeenth and eighteenth centuries. Yet, with the exception of positivism, the scorn of the philosophic jurists was heaped on nothing as unanimously as on *Naturrecht*. The foundations on which the earlier doctrines of natural law had rested had been so utterly destroyed during the nineteenth century that anyone admitting himself to be a *Naturrechtler* would have been subjected to a merciless fire. Natural law in its old form was quite beyond the pale and none might return to it, but natural law as modified by a century's thought and experience there certainly was. In its new guise this "right law," to use Stammler's phrase, claimed neither immediate objective validity nor an eternal and unchanging content. Its norms were not regarded as having binding effect until they had in some way been translated into positive law, and their content was the product less of the divine and eternal reason of man than of the whole situations which they were to order. As opposed to the classic idea of norms the content of which was eternally fixed by reason of its rationality or naturalness, the new philosophy adopted an historical position which allowed of a "right" content of law changing and developing as the society which it served changed and developed.

Natural law in the older sense of an immediately binding norm with unchanging content found acceptance only with the Catholic jurists. Of these the most prominent in the new century was the Jesuit, Viktor Cathrein. Like Kohler he ridiculed the idea that the authoritarian sovereign State was the source of all law. If one accepts such a view, he contended, "then one must regard every statute, howsoever absurd, counter to reason, and despicable, as a true statute, and one is entitled no longer to complain of injustice (*Unrecht*)."<sup>4</sup> On the contrary, he held, the ideas of good and evil, of rightness and unrightness, are born with us. Hence

<sup>4</sup> *Naturrecht und positives Recht*, 1902, p. 85. Cf. G. F. von Hertling, *Recht, Staat und Gesellschaft*, 4th ed., 1917.

the rightness of law must depend upon its correspondence with those ideas. They do not, Cathrein admits, lay down detailed prescriptions for all human action, but they give the general principles from which all other law must be derived. This natural law not merely states what should be, but is "a true, real, valid, existing law"; it is universal, effective for all men in all times and places, necessary, unchanging and unchangeable. It is the law of reason since it consists of "the practical, obligatory fundamental principles to the knowledge of which reason comes spontaneously."<sup>5</sup> Anything which the sovereign commands counter to natural law lacks binding effect.

In brief his theory of sovereignty was that it exists by grace of God. It is necessary for man to live in society; the State is thus the product of his rational social nature. Hence the State roots in natural law and its purpose and significance are determined by the latter. "But natural law itself is again nothing but the will of the highest eternal legislator manifested to us through creation. The will of God is thus the deepest foundation, the Magna Carta of the power of the State."<sup>6</sup> All that natural law demands, however, is that there should be an authority, and that the legitimately existing authority should be given obedience. What lies beyond that, he tells us, is no longer of directly divine institution. The right to obedience on the part of authority is strictly limited to the spheres in which its commands are in accord with natural law and aim at the general good.

### I. THE NEO-KANTIANS

Perhaps the most violent of the attacks on natural law was launched by Karl Bergbohm, one of the forerunners of the Neo-Kantian school. To him it was the root of all juristic evil. But, as Cathrein notes with pleasure, Bergbohm admits that the literature of almost all the world is shot

<sup>5</sup> *Naturrecht und positives Recht*, pp. 125-127.

<sup>6</sup> *Die Aufgaben der Staatsgewalt und ihre Grenzen*, 1882, p. 33. "The justification of authority (*Obrigkeit*) rests wholly on the divine investiture (*Einsetzung*). If one deserts this standpoint, then the power of the State no longer has the right to command nor the subjects any duty to obey," *ibid.*, p. 48.

through with natural law. "It is refuted," he lamented, "only in its very crudest form. One has cut off one of the heads of the hydra—in its place ten have sprung up after it." In none of the jurists could he find any lasting satisfaction: all succumbed to the sin against which he warned them, that of allowing a dualism between natural and positive law. "Today they laugh at the 'holy natural law,' tomorrow they derive from the 'legal consciousness' a maxim by means of which they 'elaborate' the existing (*geltende*) law, *i.e.*, often do it just a little bit of violence: lately they shrugged their shoulders about the incorrigible doctrinaire theorists who would not abandon their 'idea of law' or their 'ideal law,' but shortly they will apply a 'principle' which they have created in the realms beyond the sources of positive law—and every one, every single one, is absolutely convinced that as far as he is concerned he has drawn from the proper source." Nor did Bergbohm's polemic succeed in destroying the reborn desire to find something more stable and more deep-rooted than the formal construction of positive law.

For all his attack upon natural law Bergbohm did, however, advance beyond the great majority of his contemporaries in his insistence that jurisprudence could not continue indefinitely without a foundation in philosophy. It must, he held, go beyond the mere statement, analysis, and ordering of the given legal material. The jurist must cling to positive law, but at the same time he must solve the theoretical problems involved in it. The jurist, in his view, must determine not what the law should be, but what the already existing law is in its innermost being and ultimate foundation. The Hegelian problem of the value of law and its place in the general scheme of things did not concern him. He saw the philosophy of law as a purely theoretical inquiry into the intellectual problems arising within the sphere of law and as a gathering point for the highest concepts and final answers to the problems of law.

Among the strict Neo-Kantians unquestionably the most fruitful thinker to date has been Rudolf Stammler. As with

<sup>1</sup> *Jurisprudenz und Rechtsphilosophie*, 1892, p. 113. Cf. Cathrein's comment, *Naturrecht und positives Recht*, pp. 122-123.

many original thinkers the true measure of his accomplishment is to be found less in the direct acceptance which his doctrines have found than in the vast mass of controversy and criticism which they have aroused. If it was impossible to accept his closely reasoned conclusions as a whole, he none the less opened manifold new channels of inquiry, and so stated the fundamental problems of law as to bring them again to the forefront of juristic discussion.

Stammler is Kantian not only in his use of the critical method, but also in his fundamental individualism.<sup>8</sup> His final criterion of the rightness of law is expressed in terms of individual freedom, even though freedom in his sense of the term has a widely different significance from that usually given to it, because of the emphasis which he placed on its social context.

His work falls into two main divisions: his first effort is to apply the Kantian criticism to the concept of law, to analyze the formal nature of the elements entering into our legal thought. As Kant attacked the problem of the conditions of all thought and knowledge, so did Stammler seek to find the formal conditions of our thought and knowledge of law. With this epistemological problem solved to his own satisfaction, he turned to that of finding the universal criterion of "right" law. He proceeded, that is, from the question of the conceptual nature of law, wholly irrespective of any particular content, to the value judgment concerning the rightness of its content.

It is impossible to do more here than indicate the nature of the elaborate argument upon which Stammler founds his

<sup>8</sup> Stammler, writes Julius Binder, *Rechtsbegriff und Rechtsidee*, 1915, p. 12, "was the first to find the way back to Kant." He regards Stammler's as the first scientific theory of law. Emil Lask in his valuable essay on "Rechtsphilosophie," in *Die Philosophie im Beginn des 20ten Jahrhunderts*, 2d ed., 1907, p. 285, calls Stammler's the "Musterbeispiel eines rechtsphilosophischen Kantianismus."

<sup>9</sup> Stammler constantly uses the terms *richtig* and *unrichtig*, which do not lend themselves to any simple English rendering. They have been translated here as "right" and "unright" less because these latter exactly represent the original than because nothing else seems on the whole more suitable. Their exact rendering is, in fact, of no considerable importance since their significance is almost wholly determined by Stammler's particular usage of them in relation to his conception of the social ideal.

system. The method of his critical work is roughly as follows:

When we speak of a given norm as being a legal norm, we presuppose the concept of law. We cannot arrive at this concept by abstracting from the whole mass of our experience of law until we come to the most general notion, because we have already assumed that we know what "law" is. Through all our possible experience of law there runs the one universal thread "law"; it is the formal universal element or category of thought stamping certain of the contents of consciousness as legal.

To find this formal universal element a complete abstraction from the content of law is required.<sup>10</sup> Stammler insists repeatedly that there is no legal prescription the materially conditioned (*stofflich bedingten*) content of which is *a priori* immutable, but, he argues, "there certainly are pure forms of juristic thought, which are unconditionally necessary as ordering principles for any content of law whatsoever, if legal questions are to be grasped scientifically, and if there is to be unity among the ideas of law."<sup>11</sup> The claim to uni-

<sup>10</sup> Cf. Isaac Breuer, *Der Rechtsbegriff auf Grundlage der Stammlerschen Rechtsphilosophie*, 1912, pp. 1 ff. The secret of the Neo-Kantian critical movement, Breuer holds, is "that it is not the theory of an always temporally conditioned and determined system, but a formal science (*Formalwissenschaft*), nothing but theory of method." Critical philosophy is for him the theory of the subject while all other sciences deal with the object. The critical philosophy of law then requires specifically "methodologische Darlegung der Form der juristischen Erkenntnis." Cf. Binder, *op. cit.*, p. 12. For the general methods of the Neo-Kantian epistemology, see H. Rickert, *Der Gegenstand der Erkenntnis*, 1892.

<sup>11</sup> *Theorie der Rechtswissenschaft*, 1911, p. 17. A primary source of difficulty in Stammler is the question, which he appears never to answer quite satisfactorily, as to whether he uses the concept of the unity of the forms of law as purely ideal, that is, as the *a priori* condition for the formal unity in thought of the whole science of law, or as a unity existing at least partially independently in objective reality. Breuer, *op. cit.*, p. 93, makes the same point more broadly: "Ein geheimer Zwiespalt geht durch das ganze Stammlersche Werk: die theoretische Grundlegung des sozialen Lebens und die Aufweisung seiner praktischen Gesetzmässigkeit. Beide Momente sind nicht reinlich von einander geschieden." Erich Kaufmann, *Kritik der neukantischen Rechtsphilosophie*, 1921, carries this argument further by insisting that only through such a confusion, through *Ersechleuchtung*, is it possible for the Neo-Kantians to attain any significant results at all.



versality is founded on the theory that only the content of law changes, while its form is eternal. The unity of the pure ideas of law he holds to be only the unity of the procedure by which conditioned legal prescriptions are to be determined in an identical fashion, that is, the formal unity of law is for him the unity of the method of intellectual apprehension or thinking of law. "Form is thus a conditioning line of thought (*Gedankenrichtung*), a universal way of bringing uniformity into a given content of consciousness."<sup>12</sup>

The categories of time and space are not to be discovered by an *a priori* procedure; likewise the discovery of the concept of law is not to proceed *aprioristisch*, "but through critical analysis of presented experience in which that concept is contained as logically conditioning element."<sup>13</sup>

Furthermore, the concept of law is not to be arrived at wholly independently: it must be subsumed under the concept of social life. This latter he regards as the externally regulated living together and coöperation of men for the purpose of the satisfaction of needs. Here the content is that of the social coöperation itself, the form is given by the external regulation of coöperation.<sup>14</sup> The regulation of society cannot depend for its validity upon the arbitrary whims of men; it must therefore be *selbstherrlich*, that is, valid irrespective of individual consent to its norms. Furthermore, it is of the nature of law—which he holds to be the only conceptually universal mode of external regulation—that it binds its creator as well as all others standing beneath it, and it must be obeyed by him until it is formally abrogated. Thus he comes to the definition of law as "the inviolable autocratic (*selbstherrliche*) regulation of the social life of

<sup>12</sup> *Theorie der Rechtswissenschaft*, p. 7.

<sup>13</sup> *Ibid.*, p. 46. Cf. p. 73.

<sup>14</sup> The relation and interaction of the social content (*Wirtschaft*) and the social form (*Recht*) are the main theme of Stammler's earliest important work, *Wirtschaft und Recht nach der materialistischen Geschichtsauffassung*, 1896 (3d ed., 1914). Max Weber made a bitter attack on the theory here evolved in the well-known essay on "Stammlers 'Überwindung,'" etc., reprinted in *Gesammelte Aufsätze zur Wissenschaftslehre*, 1922. Stammler replied in the third edition of *Wirtschaft und Recht*, pp. 670 ff.

men.”<sup>15</sup> The inviolability of law implies not that it cannot be changed, but that so long as it is in effect it cannot arbitrarily be infringed.

Formulated legal prescriptions must be further either valid or invalid and either right or not right—it is either *geltendes* or not *geltendes Recht*, either *richtiges* or *unrichtiges Recht*. Their validity depends on the answer to the question as to whether a definite legal content in its given situation has the possibility of translating itself into reality. Their rightness or unrightness is determined through their harmony or lack of harmony with the fundamental idea of law.<sup>16</sup>

“The law,” he writes, “is, in the peculiarity of its claim to coercion, the formal condition of social regularity (*Gesetzmässigkeit*);—right law, on the contrary, gives the uniform goal for all social life and action.”<sup>17</sup> As with all of Stammler’s tools, the idea of rightness is purely formal, able to take up any content. The justification of positive law, he contends, must be that its content is the right means to the right end of social life. Conceptually all law is an attempt to be right law, but it does not always succeed in so being. To distinguish right law, we require a universal formal objective end which gives us a firm foundation for evaluation. Social life is founded on individual men; the absolute goal of the individual is freedom, that is, objectivity of determination of ends: the ends the free individual sets for himself must be not only such as arise from finite personal desire but also universally valid for any man placed in the same

<sup>15</sup> “Recht ist die unverletzbar selbstherrliche Regelung des sozialen Lebens des Menschens,” “Wesen des Rechtes und der Rechtswissenschaft,” in *Die Kultur der Gegenwart. Systematische Rechtswissenschaft*, II, 8, 1906, p. xxviii.

<sup>16</sup> Cf. *Theorie der Rechtswissenschaft*, p. 134; *Die Lehre von dem richtigen Rechte*, 1902, p. 15.

<sup>17</sup> *Die Lehre von dem richtigen Rechte*, p. 606. The seeming confusion in Stammler’s thought, referred to above (note 11), appears most clearly in regard to law. It is on one side the universal form, making social life susceptible to scientific thought—he defines *Gesetzmässigkeit*, as used above, as “the possibility of the uniform ordering of the content of our consciousness”—and on the other it is the autocratic social will binding men together for the common pursuit of ends. The two uses are mixed together indistinguishably in many passages in Stammler’s works.

situation. Hence the highest end for a society of individuals is "the community of free-willing men."<sup>18</sup> Stammler then proceeds to use this social ideal as a criterion for the rightness of the content of positive law.<sup>19</sup>

State and sovereignty, it will be seen, play no very prominent part in Stammler's system. Usually he is content to use the concepts uncritically, assuming their general significance to be sufficiently well known. He is insistent, however, that the idea of law is logically prior to the idea of the State: it is possible to define a *Rechtsordnung* without reference to the State, but to arrive at the State we must have the concept of law. Although the idea of the State is not contained in that of the *Rechtsordnung*, it is, however, essential to the idea of law as autocratic social regulation that in every legal association (*Rechtsverband*) there must be someone with whom ultimate decision rests. We thus come to the idea of legal superiority, of a will which establishes its own ends and

<sup>18</sup> *Wirtschaft und Recht*, 3d ed., p. 554. The closeness with which Stammler followed Kant's development of the categorical imperative need scarcely be pointed out.

<sup>19</sup> Gustav Radbruch, *Grundzüge der Rechtsphilosophie*, 1914, pp. 21 ff., points out that Stammler begins by denying universality to any fixed content of law and sets out merely to find the universal form of all conceivable value judgments of law, the universal means by which such judgments are possible. Passing from the pure formal concept of right law, "one is amazed to find oneself in a totally different world—no longer in the epistemology of the philosophy of law, but in the middle of the philosophy of law itself, indeed of politics. Stammler thinks here that he can use the category of law-rightness like a measuring-stick to decide concrete conflicts, to judge between opposed rightness judgments—in the same way as if one wanted to settle the controversy between two natural science hypotheses, each based on causation, by means of the category of causality." In this way Stammler falls back into the error of the old natural law theory, reaching absolute value judgments, as against slavery, polygamy, and despotism. The correct view, according to Radbruch, is that "only the category of right law is universally valid, but none of its applications," *op. cit.*, p. 5. See Kaufmann, *op. cit.*, Wilhelm Sauer, *Neukantianismus und Rechtswissenschaft in Herbststimmung*, Logos, X Bd., 1921, p. 188, note 1. Pound, *op. cit.*, on the contrary, holds Stammler's claim to greatness to rest on his having laid down principles which should aid the administrator of law in attaining justice.

In general one must take refuge in the remark of Binder, *op. cit.*, p. 56, that any misunderstanding of Stammler's doctrines is in part due to the fact "that Stammler uses an exceptionally obscure and peculiar terminology."

binds together all wills subordinated to it for the purpose of ordered coöperation. The problem as to the possessor of this will is one of purely technical and limited interest, to be answered by examination of the particular legal order. He holds it possible that there should be in a State different superiors for different phases of law, "but it then becomes necessary that a subject should also be appointed, having the final word of decision in case of doubt. And that subject is then the bearer of sovereignty in this State."<sup>20</sup>

In two ways, however, Stammler contributed definitely to the theory of sovereignty. He saw that the sovereign State is able to have legal relations with other States and to exercise, in certain cases, a measure of legal control over persons and objects beyond its own boundaries. If, he asks, the extent of a positive legal system (*Rechtsordnung*) is limited wholly to its own domain, how is it possible for the legal activities of a State to have a wider range than that defined by its own *Rechtsordnung*? He comes to the conclusion that the sovereignty of the State, as *legal* independence, requires precisely that "it be subordinated with other States to a legal will which is binding upon them," if that sovereignty is to come to its fullest development. The legal system within which this will above the individual States shall function is that of world law (*Weltrecht*). But here again Stammler immediately slips away into the abstruse and obscure: this ordering of law as a whole is only to be taken as a formal bringing together or coördination (*Zusammenschluss*). "The concept of world law," he explains, "thus means only the idea of the unconditional possible ordering of all individual laws and all particular legal systems in a comprehensive way."<sup>21</sup>

The second contribution which Stammler made to the theory of sovereignty was the indication of a means of escape from what the Neo-Kantians customarily called meta-jurisprudence. This side of the Kant-Stammler teachings was given special emphasis by later members of the school such as Julius Binder, Hans Kelsen, and Fritz Sander. The

<sup>20</sup> *Lehrbuch der Rechtsphilosophie*, 1922, p. 243, note 7.

<sup>21</sup> *Theorie der Rechtswissenschaft*, pp. 432 ff.

term metajurisprudence is used to include any theoretical procedure which finds the sources of law outside law itself. If the law is to be regarded, argue the Neo-Kantians, as a system of thought complete in itself, then it must be wrong to go beyond law in the search for its sources. This argument, naturally, deals not with genetics but with formal logic. Not the spirit of the people, the monarch, or the State creates law, but law creates itself, establishes the means by which it is to be changed, and lays down the conditions under which the will of the people, the monarch, or the State is legally valid. Thus the self-inclusive legal system comes itself to be sovereign, although not in the sense of Krabbe's *Rechtssouveränität*, since it is independent, self-determining, and self-evolving.

### THE PURE THEORY OF LAW

Next to Stammler, Kelsen, who played a rôle in the framing of the new Austrian Constitution parallel to that of Preuss in Germany, has done the most significant work of the Neo-Kantian school. Far more than Stammler he has clung close to the formal problems of law; in consequence, he has gained from the standpoint of logic, but sacrificed much of Stammler's suggestiveness.<sup>22</sup>

Like his predecessor in the field, Kelsen demands the sharpest separation between content and form, between an explicative science of causation and a normative science of means and ends. The purpose of jurisprudence, he holds, is

<sup>22</sup> In comparison with Stammler, Kelsen's work undoubtedly merits Kaufmann's description as being "the most radical attempt to carry out the pure formalism of law on the neo-Kantian basis." There is, however, also much to justify Kaufmann's further view that Kelsen's efforts prove that "pure rationalism, if it is carried through at all consistently, can come to no results whatsoever and that wherever it does produce results, they are obtained fraudulently"; *Kritik der neukantischen Rechtsphilosophie*, p. 20. Fritz Sander, *Staat und Recht*, 1922, p. 1159, remarks pertinently: "What is put into the law *a priori*, is derived from it again *a posteriori*: that is the heart of the dominant theory of public law and of Kelsen's." Cf. Carl Schmitt, *Erinnerungsgabe für Max Weber*, II Bd., 1923, pp. 13 ff. For an interesting discussion of "Kelsen's Pure Theory of Law," especially in relation to the Austrian Constitution, see Erich Voegelin, *Political Science Quarterly*, Vol. XLII, no. 2, pp. 268-277. See also, Johannes Mattern, *Concepts of State, Sovereignty and International Law*, 1928, chap. X.

the comprehension of norms, not the explanation of the real existing world. The latter sphere he assigns to sociology. "A juristic theory," he remarks flatly, "can never be hit by the accusation that it is unable to explain the reality of some social fact, since it is not called upon to do so."<sup>23</sup> To the content of law he is always indifferent since it is merely conditioned and relative; the form of law, however, is unconditioned and universal.

He acknowledges as his problem the building up of a jurisprudence wholly severed from the world of being, self-derived and self-contained. His central principle is that a *Sollen* can never be derived from a *Scin*, that, for example, a command is not binding merely because of the fact of its existence, but because it is derived, conceptually at least, from a higher norm establishing that the command should be obeyed. To understand any particular legal norm from this standpoint one must journey back through all the phases of law coming at last to the constitution of the State in which the norm exists. But even here there is no final resting-place. The investigation must still be carried on until one comes "to a general highest norm which denotes the logical origin and which, in a juristic hypothesis, institutes the constitution-giving authority." The content of the constitution and of norms issued on its authority may be obtained from any sources whatsoever, but their quality as law rests on a logically prior legal norm.<sup>24</sup> He rightly denies the validity of the accusation that he has returned to the theories of natural law, since he clings wholly to the norms of positive law, superseding them only to deduce from them the original norm which they require as a logical presupposition.

At first sight it might appear as if this theory spelled a great advance on earlier systems which derived law from the power of the ruler or State, but closer analysis shows that literally nothing has been gained. The content of law is, after all, its important feature, and this Kelsen resolutely ignores. Not even the factual source of the content of the

<sup>23</sup> *Das Problem der Souveränität und die Theorie des Völkerrechts*, 1920, p. 54.

<sup>24</sup> Cf. *ibid.*, p. v.

norm interests him. Law can be produced—i.e., logically derived—from law; if the norms of law are set by the despot, the absolute monarch, the parliament, this means from Kelsen's standpoint, that there is logically supposed a norm authorizing these persons to fix the content of law. Thus the norm presupposed in an absolute monarchy lays down that the subject must act as the monarch commands or suffer such penalties as he inflicts. On one hand is the material freedom of the monarch to determine the content of law as he will, on the other is "the formal limitation imposed by the law of the original legal prescription—without which presupposition, even if it be only implicit, no command of the absolute monarch can be regarded as law."<sup>25</sup> We are in fact told no more than that, given a legal norm, we can find its logical presuppositions. The original norm at which Kelsen finally arrives is not to be traced back to any will; it is a purely formal concept which can be filled with any content: it is only a necessary aid to thought.

Throughout Kelsen is insistent that the concept of the will in any psychological sense must be banned from the philosophy of law as forming part of the juristically indifferent land of metajurisprudence. For it he wishes to substitute the concept of attribution (*Zurechnung*), on the grounds that there are many cases in law where the psychological will is legally indifferent or perhaps empirically non-existent while to the legal will are attributed acts of the greatest consequence. The concern of the jurist is to link up the objective fact with a subject; this occurs through the process of attribution. Thus Kelsen arrives at the conclusion that the legal person is not the real person but a legal construction for the purposes of attribution.

<sup>25</sup> *Ibid.*, p. 25. Cf. p. 97, note 1. Kaufmann, *op. cit.*, pp. 20 ff., scornfully points out that all Kelsen has done is to eliminate all the material elements from empirical legal concepts until he arrives at the emptiest, most universal concept, which he then terms an *Ursprungsbegriff* and uses as the source from which by *logische Erzeugung* he can deduce again the concepts from which he set out. Kelsen replies to Kaufmann's accusation in an elaborate footnote, *Der soziologische und der juristische Staatsbegriff*, 1922, p. 99. Walter Strauch, *Die Philosophie des "Als-Ob" und die hauptsächlichsten Probleme der Rechtswissenschaft*, 1923, also comments unfavorably on Kelsen's methods.

This procedure leads Kelsen to absorb the State wholly into the formalism of law. Through an analysis of the process of legislation he decides that it is impossible to identify the will of the State with the real will of any of its organs; the will of such organs, even the very highest, becomes the will of the State only when the psychological processes of volition have come to an end. Further, the State as a separate legal subject must have a will of its own distinct from that of any physical person or persons. The acts of a physical person may, however, be attributed to some other *Rechtssubjekt*. "The individuals for whom such an attribution takes place are the organs of the State, and the common meeting-point of all lines of attribution going out from the situations of fact which are qualified as acts of organs is the will of the State."<sup>26</sup> The law itself determines when such an attribution to the State is to take place, and how and where the State—through its organs—shall act. To say that the law is the will of the State, means, according to Kelsen, that preëxisting legal norms lay down that certain acts shall be attributed to or regarded as the will of the State. The physical or psychical acts of the State's organs are juristically irrelevant: they are only material for attribution.

The will of the State is, then, only a juristically constructed attribution point. In consequence the person of the State, like all other legal personality, is merely the personification of legal norms. The difference between the State and other legal persons is that the former is the total legal system, while all others are personifications of only partial systems: the individual, for example, is the personification of all the norms regulating the conduct of a physical person.<sup>27</sup> A further difference is that the physical individual can perform a vast number of legally indifferent acts whereas the State, as wholly a legal construction, has no other content than that given it by law and no acts can be

<sup>26</sup> *Hauptprobleme der Staatsrechtslehre*, 1911, p. 183.

<sup>27</sup> *Das Problem der Souveränität*, pp. 19-20, *Hauptprobleme*, pp. 165 ff. Cf. Kant, *Metaphysik der Sitten* (*Die philosophische Bibliothek*, 1919), p. 26, "Person ist dasjenige Subjekt, dessen Handlungen einer Zurechnung fähig sind." Voegelin, *op. cit.*, gives the translation "imputation" for "Zurechnung."



attributed to it which are not foreseen by law. "Wherever anyone alleges that he acts for the State, he must be able to fall back upon a legal prescription which allows this act to appear as willed by the State, and, therefore, attributable to the State. An act of a State organ not founded on a legal prescription or statute is unthinkable in the modern *Rechtsstaat*."<sup>28</sup>

The person of the State is nothing other than the personified expression of the unity of a legal system. The whole body of legal norms lead up to a single norm of origin: this total and unified system, jurisprudence sees as the State. The State is a juristic construction rendering palpable the real logical unity running through the apparent multiplicity of a single legal system. From this standpoint Kelsen is able to heap scorn on the jurists who find, in his terms, their own construction, the State, escaping them into the realms of illimitability and unbridled freedom. For Kelsen this whole problem is merely a seeming one arising from the juristically constructed personification.

The concept of sovereignty, which, according to him, "modern *Staatsrechtslehre* reckons among its most difficult and most disputed," was given special attention by Kelsen. He saw this concept, essentially a purely legal one, used as a theoretical cloak to hide innumerable political maneuvers, and sought to rescue it, purified, for jurisprudence. He recognized that it had undergone many changes in the course of the centuries, but attempted to free it from the conditioned and local, and establish it in its pure universal juristic form. The one factor, he argues, which has remained constant in the concept of sovereignty is that the sovereign is highest. But this "highest" cannot be a highest in terms of fact, in the sense of causation. In considering social wills one cannot go further than to say that one will is higher than another: a highest uncaused will determining all other wills and itself undetermined by any will outside itself is a sheer impossibility. In this factual sense "no State (more properly: the motivating forces which one may term State in this connection) can be sovereign; every State (for a truly natu-

<sup>28</sup> *Hauptprobleme*, p. 465.

realistic approach there are only ruling and ruled men, exercising power through will), even the politically most powerful great power, is dependent, unfree, determined on every side of economic, legal, and cultural life."<sup>29</sup>

Sovereignty in the sense of absence of external motivation is absurd, but, Kelsen continues, this is not to exclude the idea of a will which is legally binding upon all standing beneath it and itself not to be bound by any other will. But here the will by which one can be bound is not the real will of an individual, but the "will" of a norm establishing that the commands of a given authority are binding. The actual command is merely the particular filling-out of the general legal right to issue commands with binding force. The real authority is thus the norm, and this authority becomes sovereign when the norm is "highest."

The fundamental error of all other theories than his own, Kelsen finds in the conception of State and sovereignty as having real existence in the world of causation. If on the other hand one views the State from the normative standpoint as norm or system (*Ordnung*) and as such identical with the law, if one recognizes that the legal system termed "State" coincides with the State system called "law," then "the sovereign State is a highest system, i.e., it is conceived as not derivable from any higher system or is presupposed as itself the highest." Whether or not another conception of the State than this juristic one is possible is of no vital moment to him, but he inclines always to deny validity to any theory which seeks to find the State elsewhere than in juristic construction. The State is a system of norms; it is a sovereign State in so far as it is a complete self-contained system, enclosing within itself all partial systems. The original norm from which the whole system of law is logically to be derived is implicit or explicit in the system (that is, it is the crowning point of the system) and is itself not to be derived from any higher norm.

Kelsen vigorously attacks the writers who attempt to make sovereignty a double concept, that is, highest power internally and independence externally. "Sovereignty," he

<sup>29</sup> *Das Problem der Souveränität*, p. 7.

holds, "consists of one single and indivisible characteristic, and means nothing else than that the thus distinguished State or legal system is a highest order and therefore one independent of every other system."<sup>30</sup> In this definition the State is credited with formal omnicompetence since there can be no higher power authorized to limit the State, but at any given moment its actual powers are only such as have been ascribed to it by law. This *Kompetenz-Kompetenz* is, however, according to Kelsen, not a necessary feature of sovereignty since there may be a highest *Rechtsordnung* which contains no provisions for its own alteration, although usually the situation is governed by the principle that any norm can be changed in the same manner as it was brought into existence.

Setting out from jurisprudence and not from politics, Kelsen is able easily to discard the notion that there can be, juristically, such a body as a non-sovereign State.<sup>31</sup> Jellinek, Laband, and other protagonists of the member-State in federalism fall easy victims to his always acute logical analysis. Unitary State, member-State, and local community are all, for him, legal systems, and nothing more. What the content of these legal systems is, it is impossible to determine juristically; in this way he rules out the criterion which would distinguish the State by the functions it performs. To the notion that the non-sovereign State is the possessor of original underived power, he replies that "a system which is derived from no higher system is sovereign." He approved Jellinek's discarded theory that the member-States are derived from the central State; the lower, included members of a system can have no powers all their own: everything must be traced back to the ultimate attribution-point. The true sovereign, however, he finds to be, much in Gierke's method, the whole system of law which includes both member-States and central State. The sovereign State is the unity of the entire system, and sovereignty alone gives a juristically satisfactory criterion wherewith to distinguish between State and not-State.

<sup>30</sup> *Das Problem der Souveränität*, p. 38.

<sup>31</sup> *Ibid.*, pp. 53 ff.

## A MAGNIFICENT FORMALISM

The formalization of law, sovereignty, and State was carried even a step further by Fritz Sander. Like Kelsen he set out to destroy any last vestiges of metajurisprudence that might be lingering in the realms of law. An interesting feature of the work of these two jurists was that both pointed out the close analogy between the metajuristic idea of the sovereign State and the theological idea of God. "In order to understand the methodology of the theory of public law," wrote Sander, "one must refer to the methodology of theology."<sup>32</sup> According to Kelsen, "the omnipotence of God in nature corresponds throughout to the analogous omnipotence of the State in the sphere of law. The theological and the corresponding juristic dogma have the same meaning. As the world system appears to the theologian as the will of God, so does the legal system appear to the legal theologian as the will of the State, and this will can take up any content. Neither from the concept of God nor from that of nature is any limitation to be derived for the content of this will. The relation of God and nature offers the same speculative possibilities as the relation between State and law. Wholly parallel too are the relations 'God-man' and 'State-individual.' Juristic theory travels here—without being conscious of it—along paths of thought which have long been used by theologians and are not infrequently mystological (*mystologisch*) as well."<sup>33</sup>

Both writers insist that the theory of the State must cease being State-theology. God is an omnipotent will above nature and unlimited by the otherwise inflexible laws of nature; He is the personification of the desires of man which cannot be fulfilled within the rigid forms of those laws. In the same fashion the metajuristic State "is an expression of certain political postulates not recognized in the legal system; it is to make possible the satisfaction of political interests to which the legal system does not grant validity,

<sup>32</sup> *Staat und Recht*, 1922, p. 11. He continues to point out that the methodology of medieval scholasticism has survived almost intact in modern *Staatsrechtslehre*. Cf. p. 585.

<sup>33</sup> *Das Problem der Souveränität*, p. 21, note 1.

which are in contradiction with the legal system.”<sup>34</sup> Natural science was achieved by eliminating the notion of an arbitrary and omnipotent God; juristic science is still in need of the elimination of the arbitrary and omnipotent meta-juristic State.

It has been shown above how Kelsen reduced the State to the wholly juristic concept of a construction for the purposes of legal attribution. The State emerged from Sander's system in even less recognizable form. Juristically he professes to be able to see the State no otherwise than “exclusively as a categorical fundamental structure of law, as a condition of the possibility of experiencing law, as analogy to the concept of substance in natural science, hence as synthetic fundamental principle of the continued legal procedure, and thus as precondition of the single meaningness (objectivity) of law.”<sup>35</sup>

The paths by which he arrived at this curious definition are by no means easy to follow. In general he was in revolt against the current view of the State either as organism or as person. These dogmas, like that of the *Rechtsstaat* he held to express no more than the political fact “that absolute monarchy must put up with constitutions,” and to have been

<sup>34</sup> Kelsen, *Der soziologische und der juristische Staatsbegriff*, 1922, p. 252. Sander works out the relation of the concepts God-nature and State-law somewhat differently from Kelsen, but the general principle is the same. “The proofs of the existence of the State,” he writes, “constitute an analogy to the proofs of the existence of God,” *Staat und Recht*, p. 12. He holds that theologically nature is an attribute of the metaphysical substratum, the absolute substance of God, while metajuristically, law is an attribute of the absolute State.

The theology of jurisprudence and political theory has been further worked out by Carl Schmitt, *Erinnerungsgabe für Max Weber*, II Bd., 1923, pp. 26 ff., who says that “all pregnant concepts of modern political theory are secularized theological concepts.”

<sup>35</sup> This definition is here quoted in full in the original, since, where the words have existence in German, they have no possible English equivalents: “ausschliesslich als ein kategoriales Grundgebilde des Rechtes, als eine Bedingung der Möglichkeit der Rechtserfahrung, als Analogon zum Substanzbegriffe der Naturwissenschaft, also als synthetischer Grundsatz der Beharrlichkeit des Rechtsverfahrens, und damit als Vorbedingung der Eindeutigkeit (Objektivität) des Rechts.” *Staat und Recht*, p. 644. It was definitions of this variety which drove Erich Kaufmann to plead in his *Kritik* for a return in jurisprudence to the recognized and recognizable realities of a real world.

accepted uncritically by the jurists. This acceptance meant the appearance of the State as substance, as a metajuristic concept. Sander sought to escape from metajurisprudence by clinging wholly to that which can be experienced as law (*Rechtserfahrung*): the State as such does not enter into our experience of law, and therefore it is to be eliminated. This experience of law, he tells us, "consists of legal prescriptions, produced by empirical legal procedure, concrete in space and time, and hence positive. It is content which exists in the form of categorical structures (*Gebilde*)."<sup>36</sup> In simple terms this appears to mean that in dealing with law our starting point must be the positive norms of law as derived through the processes of law. But even this does not fairly represent Sander's method since he appears to regard even norms as concepts dangerously near the border line of metajurisprudence.

The extreme difficulty and complexity of both Sander's thought and his terminology make it impossible to do more than hint at the nature of the solutions which he proposed for the problems of public law. That which the usual theory of public law sees as the person or thing "State," Sander takes to be "only a particular system of legislative, administrative and other procedure, whose 'boundaries' are to be determined not in relation to 'people' and 'territory,' but from the special nature of the situations of fact arising in this procedure and the special nature of the syntheses which produce them."<sup>37</sup> The State is never to be regarded as a metajuristic substratum or substance which is above and beyond the law. On the contrary it is, in a sense different from that of Kelsen, the whole of the legal system taken as a unity; it is the unitary continuity or interconnection of a special mode of legal procedure. Sovereignty in this connection becomes "the exclusive determination of law through its

<sup>36</sup> *Staat und Recht*, p. 630.

<sup>37</sup> *Ibid.*, p. 1273. In this theory, as in fact, in Kelsen's, all the customary distinctions tend to disappear. Thus public and private law cease to be differentiated, and the conception of personality approaches close to the vanishing point. Often admirable in their destructive criticism, Kelsen and Sander are, constructively, striking examples of the danger (and at the same time the ease) of fitting a complex and varied world into the narrow limits of a single strictly logical system.

own will, *i.e.*, the purity of the legal will, which produces and determines itself exclusively in its sovereign method of legal procedure." Both Stammler and Kelsen saw the law as self-evolving, as establishing the method and machinery of its alteration and elaboration. It is this feature of law which, in the last analysis, Sander appears to hold sovereign. Sovereignty is the original unity of a system of legal procedure which determines its own forms and methods.

### INTERNATIONAL LAW

One feature of Kelsen's work which is of special interest is his construction of international law. It has been shown that for the Neo-Kantians the State ceased to be a sovereign person rightly ruling over all things and became merely a function of law. The State had developed in the nineteenth century into an ethical as well as a juristic Colossus, in the twentieth it began to be reduced to less gigantic proportions. It was natural that this reaction should imply an increased respect for the realm beyond the State and including all States, that of international law.

We have seen how Stammler came to the idea, though in rather tentative form, of world law. Kelsen made the State merely a juristic construction—a conceptual attribution-point—and regarded as organs of the State those persons whose acts were legally attributed to the State. Clearly there was nothing to hinder the construction of the whole system of international law in the same manner with the individual States as its organs. That from which the whole system of State law is derived is for Kelsen a hypothetical original norm; it was simple for him to set up a similar norm for the whole of international law.

Kelsen saw two possible juristic constructions of international law between which there is, from a purely juristic standpoint, nothing to choose, although politically one is far more valuable than the other. One may set out from the primacy of the legal system of the State and regard international law as binding upon each State because it is a part of its own law; but this method of construction leads to difficulties both juristic and political. In the first place interna-

tional law can then scarcely claim an independent existence since it is no more than one section of the system of State law. Further, the sovereign State is little likely to be content with the limitations imposed on it by the very existence of other States equally sovereign; and their sovereignty is, in fact, from its own standpoint, dependent upon its recognition or delegation.<sup>38</sup> The primacy of the legal system of the individual State has the inevitable effect of elevating this State above all others. "The exclusiveness of sovereignty, the one-sidedness of the sovereign State ego, is only analogous to, is more than analogous to, the inescapable solipsistic result of subjectivism."

International law may, then, be constructed on the basis of the primacy of the law of the State; it may also, however, be regarded as the law of a community including all States. The State is nothing other than a system of legal norms; international law is the same. The difference between the two is only one of content, essentially they are identical. As one system of norms is personified as the State, so the other may be personified as the universal or world legal system. In this way it becomes merely a question of terminology whether or not the term "State" is applied to the world community: the decision will rest not on any formal difference between the two, but on their divergence in content. If one defines "State" as "highest sovereign system," then one "must transfer this characterization from the individual State which is now a lower and subordinated system of norms and has become a partial system, to the personification of the universal legal system standing above it, which can now alone be held sovereign."<sup>39</sup> This sovereign universal system will then be

<sup>38</sup> Cf. *Das Problem der Souveränität*, pp. 187 ff. Kelsen seems here somewhat to overstress the purely conceptual aspect, insisting that from the standpoint of construction it is necessary to regard every other *Rechtsordnung* as existing only by delegation of the sovereign *Rechtsordnung* in which the construction begins. There is, however, both political and juristic significance in his comment that the inherent tendency toward unity drives one on to the construction of one's own *Rechtsordnung* as an *Universalordnung*.

<sup>39</sup> *Ibid.*, p. 250. Kelsen insists that the unity of juristic thought demands that all legal systems, from the smallest to the greatest, must be regarded as identical in nature, whatever their differences in content. Cf. p. 288.



derived from its own (hypothetical) original norm, and all lower systems must be regarded as derived from it.

These considerations led Kelsen, admittedly from a political and not from a strictly juristic standpoint, to plead for the coming of the world State. "Just as the subjectivism of the natural law social contract theory was overcome by the idea of the sovereignty of the State and the objective validity of the legal system of the individual State placed beyond doubt, so, with the overcoming of the dogma of the sovereignty of the individual State, will the existence of an objective international—better, world—legal system, independent of all 'recognition' and standing above the individual State, a *civitas maxima*, carry itself into effect. The idea of sovereignty must indeed be radically pushed aside. This revolutionizing of cultural consciousness is necessary above all else!"<sup>40</sup>

Kelsen was not alone among the Neo-Kantians in his attack on the concept of sovereignty. In the struggle against it he was joined by Leonard Nelson, who professed himself quite ready to see the concept banished wholly from the sphere of jurisprudence and political thought. Where Kelsen, however, dealt with the problem of sovereignty only formalistically in the main, Nelson sought to get at its heart.

More frankly than others of the philosophical jurists, Nelson admitted that he was unable to share the scorn of the modern positivist for the era of natural law—a position in which he was supported by Gustav Radbruch.<sup>41</sup> A science of law which protested not only its inability to decide between right law and wrong, but even its indifference to the problem, had, he justly contended, small claim to an air of lofty superiority.<sup>42</sup> Furthermore, he followed in the footsteps of

<sup>40</sup> *Ibid.*, p. 320. He contends here that the concept of the sovereignty of the individual State has more than any other factor impeded the progress of international law and the development of the world community.

<sup>41</sup> Radbruch held that the jurisprudence of the twentieth century was coming back to the traditions of the eighteenth with the difference that it is now recognized "that the right law differs from people to people and from age to age, indeed is conceived differently from man to man according to *Weltanschauung*, and political outlook," *Einführung in die Rechtswissenschaft*, pp. 31-32.

<sup>42</sup> *Die Rechtswissenschaft ohne Recht*, 1917, p. 191.

the critical Neo-Kantians in denying that will or power or any other extra-legal factor could create law. Power, he held, cannot create law, but it must, if law is to rule, be drawn into the service of law. Through the provisions of law a will or power might attain legal significance, and as such exercise a decisive influence in the formulation of further legal norms, but the will or power itself, according to Nelson, could never be regarded as the source of law. The basis for the validity of law, he held, could only be a prior legal norm, and if no such norm but only a will or power existed, then the law had no basis for validity. In like fashion he combated the theory that compulsion formed an essential element in the concept of law. "A rule of conduct," he wrote, "is law or it is not law. If it is law, then it must continue to be so, even if the factual force which ensures its observation is accidentally lacking. And if it is not law then it cannot be made law by bringing about obedience to it through compulsion."<sup>43</sup>

Nelson's formal method was clearly that of the Neo-Kantians. He argued that a norm laid down by the legislator, for example, was in itself merely a fact and imposed no obligation whatsoever; its obligatory character (*Verbindlichkeit*) could come only from another law which endowed it with legal significance. But "such a law is absolutely nothing 'positive,' i.e., determinable as fact in space and time, but it is necessary and universally valid, and is susceptible as such only to thought and can never be found empirically." His own philosophical method Nelson termed juristic criticism.<sup>44</sup>

Setting out from the intimate relation between law and ethics, Nelson defined the former, in good Kantian manner, as "the practical necessity of the mutual limitation of spheres of freedom in the interaction (*Wechselwirkung*) of

<sup>43</sup> "System der philosophischen Rechtslehre und Politik" (Vol. III of *Vorlesungen über die Grundlagen der Ethik*), 1924, p. 7. (Also published separately in 1920 as the *System der philosophischen Rechtslehre*.) Cf. *Die Rechtswissenschaft ohne Recht*, pp. 91, 150, 180.

<sup>44</sup> Cf. *System*, §5. As characteristic of juristic criticism he holds the following points: it is founded on an *a priori* principle which is arrived at through reflection (*Nachdenken*) and is clear and attainable. Further, it is not merely an exercise in logic but requires a metaphysics of law.

persons." The *a priori* principle of law is thus that there be a limitation of the free inclinations of the members of society in relation to each other. That norm which formally satisfies the conditions of this principle (and of further principles analytically to be derived from it) is law and imposes obligations wholly independently either of its enforcement or of the recognition of it as law by the individual. It is law objectively and in its own right, irrespective of anyone's support of it or attitude toward it. The use of compulsion Nelson found to be justified only where the individual did not himself fulfil his legal obligations. Law is law in its own right, but according to Nelson, since objectivity is essential to law, it is necessary that society subordinate itself to public and objective law, to public courts judging disputes in terms of this law, and to a public force preventing violations of it.

The ideal of law, according to Nelson, is a condition in which there would be no illegality in society. For the realization of this ideal it is necessary that "one will which has at its disposal a power superior to all other powers in the society" make the realization of the ideal its goal, and force all the lawless powers of society into abeyance. This will, commanding highest power, Nelson termed government, those united under it the people, while the form of the two together constitutes the State. He conceded that law might be overpowered by force and that government might be transformed into despotism, but on the other hand he argued that law could secure primacy only by enlisting force behind it. Against anarchy he urged that force would rule whether governments were abolished or not and that, in consequence, it was better to organize force as a legal instrument in the service of law than to let it slip beyond the law. The State, then, was for Nelson an organization of society having the purpose of making the law effective in society through force.<sup>45</sup>

Through these considerations Nelson came to two further closely related principles. Force cannot make law, but is necessary to make law effective. On one hand, therefore, the

<sup>45</sup> *System*, p. 175.

power of the State must be legal power and must be limited by law. On the other, the power of the State must be highest power if it is to overcome all the illegal forces: this "leads us to the proper maxim of the political illimitability of the government." Thus the government is highest and unlimited power, but is still power determined and limited by law.

Nelson faced frankly the problem of the possible abuse of its highest power by the government. Here, he said, no political guarantees could possibly be given since if a higher power were to be set up to judge between government and people, it would itself become in fact the government as possessor of highest power. Good faith and the moral force of the public consciousness of law alone could furnish any satisfactory guarantees. Lacking this moral force, the use or abuse of its constitutional powers by the government rested upon its own good will.<sup>46</sup> This is by no means to say that the government can act illegally with impunity—Nelson insisted that it should act only within the limits of law—but merely that there can be no legally organized power able to compel governmental legality.

As one of the formal principles of law Nelson laid it down that law must be recognizable as law: that it is so recognized (*anerkannt*) does not make it law, but it is not law unless it can be recognized since law is a product of the reason. As a reasonable being every member of society carries the general legislative will within him; that is, the principles of law are a part of his rational nature. No law, Nelson held, could be binding that was not founded on this general will. "The right of legislation," he continued, "inheres in fact in the general will thus understood. This general will, *i.e.*, the *reason* of every individual, is the true sovereign according to law (*von Rechtswegen*). And there is no other right to sovereignty than this."<sup>47</sup>

It might seem as though this view would have led Nelson to embrace democracy. It did not. In fact he denied at length

<sup>46</sup> *System*, §§70 ff. See *Die Rechtswissenschaft ohne Recht*, p. 105, where he concedes that the small States in a world federation could ultimately find no other guarantees of their rights and interests than in the "public consciousness" of law and good faith.

<sup>47</sup> *System*, pp. 217-218.

that the principles of democracy or of popular sovereignty could in any way be derived from the ideas of law and politics. The particular construction of the constitution of the State Nelson held in general to be legally indifferent: of importance was only the principle that law should rule and that the statutes of the State should embody that which reason could describe and recognize as law. Reason is sovereign, said Nelson, and he derived therefrom the admirable maxim that the wisest should rule, but his suggestions as to the selection of the wisest seem scarcely adequate. Science and opinion are to be free, all are to be educated, and, since we are a rational race, the wisest among us will wisely and surely rise to rule us.

For the most part, however, Nelson was by no means content to deal so gently and philosophically with the concept of sovereignty. His attack upon it centered about the position of the sovereign State in international law, and was directly inspired both by the War and by the attitude of the jurists toward it. He vehemently denied that it was possible to see the War as part of man's unavoidable destiny, and to hold wholly irresponsible for its outbreak "the wise men of the law who were harmlessly pursuing their science." "For," he continued in a notable passage, "so long as those whose highest calling it was to seek to ensure the security of law and to whom the high duty is entrusted of strengthening the consciousness of law in public life and leading it to victory over all deification of power, so long as these so far alienated themselves from the duties of their profession as, in the dizziness of the dance around the golden calf of sovereignty, themselves to sink in the dust before this idol, there is no reason to search for an evil spirit ruling in obscurity, in order to shift to it the responsibility for that which has come, and which only a sufficiently developed public consciousness of law could have averted."<sup>48</sup>

The golden calf of sovereignty, to use his own phrase, Nelson regarded as absolutely a false idol. Such a plea as that of Fritz Berolzheimer that the destruction of sovereignty would mean the destruction of the State he rightly

<sup>48</sup> *Die Rechtswissenschaft ohne Recht*, pp. 230-231.

dismissed as the sheerest nonsense. On the contrary, he argued, only with the erection of a law and a power above the individual State would the latter obtain a legal and effective guarantee of its continued existence.

Every society, he continued, must have as its ideal a condition in which the lawless forces were subordinated to the law and the power which made the law effective. This could be accomplished in any society only through the erection of a common government equipped with an adequate power to compel obedience to the law: hence, he maintained, not until the society of States had organized itself in the form of a political commonwealth could it achieve the ideal of lawfulness and of peaceful intercourse. He pointed out on the one hand that no single life and no fragment of the State's control over its own private affairs need be lost in the subordination of the State to a world federal union; and on the other that "there can be no less sensible argument than the assertion that the existence of the States and the integrity of national individuality must fall a victim to the founding of the federation of States."<sup>49</sup> The present sovereign State holds its independence only at the mercy of its neighbors: organize the community of which that State is a member, said Nelson, and its independent existence then becomes a juristic fact instead of merely the chance result of arbitrary trial by war. A considerable part of the difficulties of international law and international organization he put down to "the terrorism exercised by the concept of sovereignty."

Against Jellinek's contention that the State was bound to the fulfilment of its international obligations through its own will, Nelson pointed out that a legal obligation could be legally binding only through law and that it was impossible to conceive a will as legally bound except in terms of pre-existent and objective law. Furthermore, he ridiculed the idea that the concept of sovereignty could be brought into harmony with the idea of law as an objective regulation of spheres of freedom. The only meaning, he suggested, which could be put upon the concept of sovereignty in international affairs was that the sovereign State had a "right" to

<sup>49</sup> *Die Rechtswissenschaft ohne Recht*, p. 113.

do anything it chose. Such a right, Nelson concluded, shattered the whole basis of the concept of law, and was in contradiction not only with law but with itself.<sup>50</sup> To entrust the observance of international law wholly to the subjective whim of the sovereign State is in fact to deny the existence of any such law.

The alternative construction which Nelson offered to the present "barbaric state of anarchy in international law," was the world-federation—a political commonwealth having power not directly over individuals but only over States. This organization was not again to be a State: it was to be a *Staatenbund* and not a *Bundesstaat*. Sovereignty, he held, could have legal significance only if it meant the legally guaranteed independence of the State in its own sphere, a condition which could be attained only through a world federation. That the individual State must reserve to itself a right of ultimate decision where its life interests were concerned, as Kohler and others had maintained, Nelson vigorously denied. Since the primary interest of the State was the realization of the ideal of law, he held that there could be no other interest which could justify the State's breach of law. Further, the State has no interests apart from those of its members, and Nelson argued that the continued existence of the particular State could not be a necessary condition for the satisfaction of those interests. "The end of the independent existence of a State," he wrote courageously, "means for its members in and for itself nothing other than a change in administration."<sup>51</sup> Nelson justly denied, however, that any such sacrifice of the existence of the State would be the consequence of its entry into a world federation.

<sup>50</sup> No State, Nelson argued, can have a legal right to sovereignty since its right must be reflected in a correlative duty, and this would place an obligation on other States regardless of their sovereign will. Further, international law is (or was) based on the theory of the equality of States as implied in the theory of sovereignty in its usual form; if this be true then here again a duty—that of the recognition of equality—is placed upon the sovereign State regardless of its will: *Die Rechtswissenschaft ohne Recht*, p. 60; *System*, §218.

Nelson, it may be remarked, recommended a breach with the principle of the equality of States on the grounds that law should recognize that the stronger State would in fact have its own way.

<sup>51</sup> *System*, p. 528.

## II. THE NEO-HEGELIANS

It has been shown that strict Neo-Kantianism tended toward an extreme formalism chiefly concerned with the conceptual ordering of the contents of legal consciousness and with the elements involved in our thinking and knowing law. Thus the Neo-Kantians came again, from a wholly different angle than the positivists, to regard law as a form into which any indifferent content might be poured: it is not unfair to say that they worked out the methods of a universal scientific approach to law by eliminating from it all its infinite variety and complexity. Stammler saw that the ultimate criterion of law must be a value-judgment but the formalists were prone to forget this "metajuristic" notion and limit themselves to the attempt to discover a universal means of conceiving any law or system of law regardless of its content.

The Neo-Hegelians, on the other hand, gave themselves a far wider sphere of action. They set out to determine the relation of law and State to the whole of human culture in its eternal evolution. The Hegelian dialectic they on the whole discarded, but they held fast to the principle of the ever developing and evolving interconnection of all things. In the words of one of the members of this school: "We are Neo-Hegelians in that we recognize and acknowledge with Hegel the immanent rationality of law (*Rechtsvernunft*), the relative justification of every phase of the evolution of law. We are Neo-Hegelians in so far as we have absorbed into ourselves the methods of empirical research of modern times."<sup>52</sup>

As Bergbohm is considered the precursor of the Neo-Kantians, so Adolf Lasson served to reintroduce Hegel to the world of juristic thought. Lasson, however, added virtually nothing to the teachings of the master: the Hegelian system was reproduced by him almost intact.

Kelsen set as his goal the formulation of "a pure theory of law, cleansed in particular of all sociological, psychological, and political elements." Lasson likewise acknowledged no

<sup>52</sup> Fritz Berolzheimer, *Deutschland von Heute*, 1910, p. 108.



other purpose than the promotion of the scientific knowledge of law, but at the same time contended that "the philosophy of law cannot possibly escape involving itself in the contentious social and political questions."<sup>53</sup> He further confessed that he clung with "unbudgeable obstinacy" to the old conservative political ideas of the Prussian State, to evange-  
 lic and Lutheran orthodoxy, and to the ancient German respect for law, rights, the person, and his property. With Hegel he protested that "in all seriousness the real is the rational."

Again he followed Hegel in seeing law as the expression of freedom; "man," he wrote, "finds his own lasting and true nature embodied in law—in law in general, and in the determinateness of positive law."<sup>54</sup>

Law, according to Lasson, is the body of prescripts governing action which are generally effective and recognized in an extensive human society. It is essential to law that there be an authority competent to judge in case of conflict and a highest power able to enforce obedience to its norms. A human society organized so as to have such a highest power is a State. Lasson then reverses his procedure and makes the content of the will of the State law. The State is a *Rechtsstaat*, but for Lasson this means less that the State is limited to legal activities than that whatever the State does it necessarily does in the form of law. "The State," he argued, "can will nothing other than the law, *i.e.*, than its own will. Any desired content which the State wills becomes immediately, because the State wills it, a legal command, and the State can will nothing other than in the form of a legal command."<sup>55</sup>

Furthermore, the State is the only body which may resort to coercion and not itself be coerced. Its force is incomparably superior to that of any other body, and must be re-

<sup>53</sup> *System der Rechtsphilosophie*, 1882, p. viii. Strict Neo-Kantianism may be seen as an attempt to carry the juristic flight from sociology one step farther than even Gerber had succeeded in doing, while Neo-Hegelianism is the admission that jurisprudence must take cognizance of sociology.

<sup>54</sup> *Ibid.*, p. 271. This identification of law and freedom follows, of course, at the expense of *Willkür* and the *zufälligen Einzelheit*: freedom here is "real" freedom, and as such not to be identified with any recognizable empirical freedom.

<sup>55</sup> *Ibid.*, p. 288.

garded as the sole original source of all coercion and force exercised within the community.

There can be no doubt that it was from Hegel that Lasson learned to know the glory and majesty of the State. The individual, Lasson held, may act casually and arbitrarily; the will of the State, on the contrary, is universal, reasonable, and self-consistent. Hence the State is a natural being of a higher order than the individual. "The State is the highest and last of all natural things, as the law which is the content of its will is the highest and last of all natural systems. The empirical individual is for the activity of the State nothing but an object serving the State's ends. . . . He is used with his strength for the ends of the State, and if necessary consumed. . . . Hence the natural individual with his interests is sacrificed for the State as soon as it is necessary."<sup>56</sup>

It is evident that the concept of sovereignty, in Lasson's usage, begins again to take on a very real and positive content. The claims of the individual oppose no substantial barrier to the power of the State; nor do the claims of other States. The State is, by Lasson's definition, sovereign: it is highest earthly power and the source of all law and coercion internally, and again highest power externally. Where there is no sovereignty, there is no State; and where there is no State, there is no law. Hence there can be no such thing as law between States, as international law, except on the hypothesis of a world State, and this hypothesis Lasson discards as wholly impossible and undesirable, since each State

<sup>56</sup> *Ibid.*, pp. 289-290. Lasson naturally also follows Hegel in proclaiming the divinity of State and authority. The State is a mirror of the reason of the universe and is thus touched by the godlike and sacred, p. 293. "The outer structure of the universe attains its end and its crown in the structure of the State," p. 297. The State, authority, and law are all copies of the divine order of the universe. "The king as the embodiment of the majesty of the State is the anointed of God," p. 309. He conceded, however, that the State at any particular moment of its evolution was only imperfect and finite in comparison with that which it should become. *Cf.* p. 380.

Constitutional monarchy he held to be the ideal form of government, *cf.* §59, while "feudalism, socialism, and theocracy" are absolutely antipathetic to modern culture, p. 670.

is the embodiment of a nation destined to fulfil a necessary and historic mission.

The relations of States must, according to Lasson, be determined not by law but by power. Since the States of the world are clever and guided by utilitarian motives they have adopted a code of rules for their common observance, but the validity of these rules depends always on their coincidence with the interests of the sovereign States concerned. The Hobbesian state of nature "is the lasting and only possible condition for States. . . . Between States a legal relationship cannot be established."<sup>57</sup> From here it is an easy step to the glorification of war. The dream of a legal system above the States is not only barren and senseless, but is born from cowardice and false sentimentality. War, on the other hand, realizes the highest ethical demands. It is the only judge who speaks not in terms of a law-book, but in terms of the true justice of power. Thus the most powerful State is the best State with the best people and highest culture, and its ability to enforce its claims makes them just and right.<sup>58</sup> The State, according to Lasson, must not regard its fixed boundaries as final limitations upon it, but must seek ever to extend its power as far as it can. In relation to others outside itself, the State is a selfish will, unbridled and untamed, which knows no moral duty, no legal code, and serves only its own utility.<sup>59</sup>

The curious fascination of this ultra-Hegelianism for the German temper is clearly indicated by its reappearance in the work of another sober jurist just forty years after the publication of Lasson's *Principle and Future of International Law*—not to mention, of course, the large number of non-juristic writers who took up the same position. Three years before the War, Erich Kaufmann, whose exaggerated but telling criticism of Neo-Kantianism has been extensively utilized in the previous section, put forward his notions of international law in general and of the obligations imposed

<sup>57</sup> *System der Rechtsphilosophie*, 1882, p. 392.

<sup>58</sup> Lasson, *Prinzip und Zukunft des Völkerrechts*, 1871, pp. 67, 74 ff. Here he writes, p. 83, that the hate of the peoples preserves the sacred goods of the Fatherland.

<sup>59</sup> *Ibid.*, p. 81.

by international treaties in particular.<sup>60</sup> The conclusions at which he arrived were strikingly similar to those of Lasson.

For Kaufmann the State was essentially power, and highest power. This he based, with explicit reference to Haenel, on the universal functions which the State must perform; that is, the supreme and sovereign power of the State is not to be derived from juggling with the concepts of "highest" and "power" but from the fact that the State must have a universality and totality of purpose, that it must set up and direct a complete plan for human cultural life. Like Brie, Kaufmann held this universal activity of the State to be primarily a subsidiary one. Not only is the promotion of cultural life the duty of the State, but the State is further "the organization which a people gives itself, in order to thread itself in to world history and to assert its peculiar genius in it."<sup>61</sup> Since no higher earthly purpose is conceivable, the State's legal system must be sovereign, limiting and containing all others.

As through the dialectic Hegel had come to the unity and identity of the individual and the universal, finding the individual truly perfect and complete only when it had been merged into the universal, so Kaufmann held that the absolute subjection of the individual to the State could find ethical justification only in that the former first attained completeness and freedom in and through the State. But, again with Hegel, Kaufmann did not see the State as an entity severed from and above the people, but as the embodiment of their spiritual community. Using Gierke's terms, he held the State to be an irreducible compound of both *Herrschaft* and *Genossenschaft*.

"The essence of the State," he wrote, "is the development of power, is the will to assert itself and make itself effective in world history."<sup>62</sup> Hence the world State of the dreamers

<sup>60</sup> *Das Wesen des Völkerrechts und die Clausula rebus sic stantibus*, 1911.

<sup>61</sup> *Ibid.*, p. 138.

<sup>62</sup> *Ibid.*, p. 135. In the *Kritik der neukantischen Rechtsphilosophie*, Kaufmann protests against the critics who accuse him of identifying *Macht* and *Gewalt*. He defends himself on the grounds that in his view *Macht* must always rest on a moral or spiritual foundation while *Gewalt* does not. It is

is an impossibility: the world State, lacking the necessity to increase and assert its power, would lack the most essential feature of the State, the feature which constitutes its life-principle, serves as its guiding-star, and keeps its members from decay.

From these premises Kaufmann deduced a social ideal which he rightly announced to be quite different from Stammler's "community of free-willing men." The social ideal, he proclaimed, is the victorious war. In war the State reveals itself in its truest colors; war is the highest achievement of the State, bringing its genius to the finest flower. Peace, on the contrary, he described as a concept without any positive meaning, having significance only when put beside its counterpart, war: "it has meaning only as a term for the end of a struggle for goods."

Lasson had denied the existence of any such thing as international law, while Kaufmann insisted that it did exist; but between the denial and the affirmation there is very little to choose. The inadequacy of Kaufmann's "construction" is so patent that it is scarcely worth discussing at any length. The international community, he argued, must have some central principle about which to build its legal system, but since each State is exclusively, if one-sidedly, universal, this is rather difficult. Certainly the negative and abhorrent concept of peace cannot furnish such a principle. International law, he suggests, would only be possible "if we could recognize the rightness of the maxim 'Only he who can, may' for these coördinated subjects. That would be, in contrast to 'peace,' a positive principle which could constitute a legal system as a just system for the division of the goods of life."<sup>63</sup> Fortunately for his construction he found that this maxim fitted perfectly, since it left the State quite free to

true that he acknowledges that the power of the State must rest on the good faith of the rulers and the confidence of their subjects in that good faith (*Kritik*, p. 72, note 1; *Völkerrechts*, p. 140); but his *Macht* still includes so much *Gewalt* that the accusation must be held just, especially in relation to international affairs.

<sup>63</sup> *Ibid.*, pp. 151-152. This delightful maxim of "law" is, in the original, "nur der, der kann, darf auch." Kaufmann's international law and international community were limited, it should be noted, to the particular treaties existing between States, and the communities formed by them.

pursue its own course as a sovereign body and to bring its causes before the world court of world history to be settled through the trial by battle. Kaufmann conceded that there might on occasion be accidents which would give victory to the wrong side, but he protested an optimistic faith that the *Kulturplan* which had the greater inner justification and truth would have the greater strength. And so, he concluded, for international law as for State-law, the victorious war appears as the custodian of the idea of law, "as the ultimate norm which decides which of the States is in the right."

### MODIFIED HEGELIANISM

Fortunately this ultra-Hegelian view of State, sovereignty, and war did not extend to all the members of the school, who took from the master other elements of his philosophy than the worst.

The outstanding figure among the Neo-Hegelians—Dean Pound has called him "without question the first of all living jurists"—was Josef Kohler,<sup>64</sup> a man whose range of knowledge and interest was perhaps too vast to allow him to bring it to satisfactory systematic form. Undismayed by the immensity of the task he suggested that one must lay bare the entire universal history of law before one might arrive at a secure foundation for the philosophy of law. This latter should then expose the relation of law to the entire history of culture. Here he departed wholly from the Neo-Kantians, but in one thing he was in full agreement with them: mate-

<sup>64</sup> Kohler regarded Hegel as the founder of the science of the philosophy of law and the destroyer of scholasticism and natural law. Especially as regards the principle of evolution Kohler contended that "the philosophy of the twentieth century can set out only from Hegel." He realized, however, that much of Hegel must be discarded, notably the rigid dialectic and the extreme rationalism. "The logic of world history," he wrote, "is combined with a great deal of unlogic"; *Lehrbuch der Rechtsphilosophie*, 1909, p. 13. Next to Hegel he considered, curiously enough, Nietzsche as the man who had done most to pave the way for the new philosophy of law through his *Umwertung aller Werte* and his insistence upon the illogical and irrational. Kant is discarded as lacking the historical relativistic sense. An interesting comment on the Hegelian dialectic is to be found in Kohler's introductory article, Holtzendorff's *Encyklopädie*, 7th ed., 1915, I, 14.

rialism was dead, and the day of the philosophy of the spirit had already dawned.

He held also with the Neo-Kantians, though on quite different grounds, that German jurisprudence had had more than its fill of the juristic positivism which brought law back to the command of the legislator. If the validity and rightness of law depend exclusively on its source, then clearly its content becomes indifferent, a conclusion which, as has been shown above, the Neo-Kantians could accept without accepting the premise, but which was completely irreconcilable with Neo-Hegelianism.

Kohler saw law as that system of order without which civilized life was impossible. The function of law he held to be twofold: on one hand it gave the régime of order which made culture possible and preserved the cultural goods of the community, and on the other it was itself a promoter of culture. In other words the function of law in relation to culture was not only negative but positive as well. But culture is an ever changing, ever progressing state. The requirements of one culture are not the same as those of another, nor is the culture of yesterday the same as that of tomorrow. Hence law must be in a state of constant flux to fit itself to the needs of the changing culture which it serves. The criterion of the rightness of law is to be found in the degree of its correspondence with the general culture in which it functions. Practically this implied for Kohler that the legislator and the judge must always be striving so to fashion the law as to bring it into harmony with the definite postulates of the given stage of cultural development.<sup>65</sup>

The State unquestionably took a high place in Kohler's thought, but his outlook was too broad and temperate to allow him to follow Hegel and Lasson into the almost uncon-

<sup>65</sup> Cf. *Lehrbuch der Rechtsphilosophie*, pp. 2 ff., 38 ff. Two of Kohler's definitions of law may be cited here as showing different phases of his thought. Technically he holds that a "Rechtsordnung ist eine durch die soziale Natur des Menschen in sozialer Weise gegebene Zwangsordnung der menschlichen Lebensverhältnisse," *Einführung in die Rechtswissenschaft*, 1902, p. 1. More philosophically he defines law as "die Norm des Verhaltens, die sich infolge des innerlichen Triebes nach vernünftiger Lebensgestaltung von der Gesamtheit aus dem Einzelnen aufdrängt," *Rechtsphilosophie*, p. 39. Cf. the definition given in *Das Recht als Kulturercheinung*, 1885, p. 5.

ditioned deification of the State. For him it is an "organic unit of the highest order" whose purpose is the furtherance—if necessary by means of force—of human cultural aspirations. Its sphere of action is formally unlimited: the whole range of human culture stands under its protection and receives its assistance. Such other institutions as may exist for particular cultural purposes must, according to Kohler, be parts of the State and function within the State organization, since the latter is all-inclusive. The State is at once *Rechtsstaat* and *Kulturstaat*. It bears within it not only its own justification, "but also its sanctification (*Heiligung*): to doubt the State, is to doubt culture, since a cultural development without a regulated energetic activity of the collectivity and without the necessary social means of protection is an impossibility."<sup>66</sup>

From a philosophical standpoint Kohler defined the concept of sovereignty and its application with precision, but practically he appeared to see it as an idea of varying content and value. Since the State is for him the realization of the moral idea, it is morally justified in claiming sovereignty. The State must determine for itself how far its actual competence shall extend in the sphere of culture; that is, it must be independent both internally and externally. No other State can be in a position to dictate to the sovereign State what course of action it shall or shall not pursue. Furthermore, the State, according to Kohler, has the highest right over the individual since the individual can realize himself only as a member of the organized culture-community.<sup>67</sup>

Philosophically, then, sovereignty inheres in the State as the highest and independent organic unit for the furtherance of culture. But practically Kohler did not regard sov-

<sup>66</sup> *Rechtsphilosophie*, p. 143. The justification of the State, *ibid.*, p. 144, is that it drives back the forces of *Unkultur* and lifts man culturally higher and higher.

<sup>67</sup> Cf. *Rechtsphilosophie*, p. 203. *Einführung in die Rechtswissenschaft*, pp. 108 f. The transition from the individual to the community to the State always presents difficulties. Here, since the individual can only be effective as a member of a community, Kohler concludes that "the common will must therefore also be his will, and this common will is the will of the culture-world, which crystallizes especially in the State," p. 109.



ereignty as an absolute concept. Thus in relation to federalism he ignored the usual tortuous logic of the jurists and was for the most part content to consider the member-State as having sacrificed some of its sovereignty to the central State while yet retaining sovereignty in its own sphere. The newly created central State is itself sovereign and State, but its members have an equal claim to the same titles.<sup>68</sup>

A similar situation appears in Kohler's treatment of international law. The sovereign State is wholly independent and highest, but Kohler conceded that there were certain fundamental principles which the State must respect if it did not want to put itself outside the community of *Rechtsstaaten*. He saw that the development of international law and of the international community had brought it about "that one relinquishes, something of the strictness of the concept of sovereignty."<sup>69</sup>

Kohler's task in dealing with the problems of international law in general was much simplified by the historical and relativistic nature of his approach. He was not forced to say that law is and is only the coercively enforced commands of the State: this he saw as historically only one of the many forms of law. Early law did not rely on the power of the State for its enforcement, but conceded the right of self-help to the individual who felt that he had suffered through a breach of the law. There was, according to Kohler, neither a judge to sit on the case nor an officer of the law to execute the sentence. He held it impossible, therefore, to deny the legal character of international law because of the lack of judge and objective coercive power.<sup>70</sup> Furthermore, "it

<sup>68</sup> Cf. *Rechtsphilosophie*, pp. 205 f. Second thought seems to have brought him a realization of the difficulties of this position since, p. 206, he remarks that in a sense the federal State implies the dissolution of international law into State law "since the member States have no sovereignty and not even a power-position similar to that of sovereignty, but are as much subordinated to the central State as are individual members of the State." But see *Einführung in die Rechtswissenschaft*, §58; *Grundlagen des Völkerrechts*, 1918, p. 8.

<sup>69</sup> *Recht und Persönlichkeit in der Kultur der Gegenwart*, 1914, p. 260.

<sup>70</sup> One of Kohler's closest associates, Fritz Berolzheimer, also attempted to give an historical explanation of the shortcomings of international law, regarding it as the product of a culture still too young to allow law unquestioned predominance over force. But since Berolzheimer clung to the

would be very sad if the law had its abiding place only in the help of the State, and not in the breasts of men as well." The idea of justice, he contended, was a potent force in human affairs and neither individual nor State would normally turn to self-help in what was regarded as an unjust cause.

Hence the legal nature of international law need not be doubted despite the lack of a world State empowered to enforce it. Such a world State Kohler regarded as the ideal of cultural development: all States should join together to give each other mutual aid in the struggle for cultural advancement, but he saw the day of its coming as far distant. For the immediate future we must look to the State as the bearer of culture. "Only gradually," he wrote, "are we coming to a kind of world State, in that always more and more individual States join together and embody the community of cultural aspirations in common legal institutions."<sup>71</sup>

In the meantime, argued Kohler, our effort must be to develop the existing body of international law. He pointed out logically enough that this system of law being *ex hypothesi* international it was impossible to believe that sovereignty was a hindrance to its development: where the principle was eliminated (or thrown into the background) as in federalism there international law ceased to exist. The coming of the world State would be coincident with the passing of international law as such. International law, according to him, is by definition the law regulating the relations of sovereign States.

Its basis is neither the building up of the world State nor the limitation of sovereignty, but the cultural need of mankind for an ordered intercourse between States. For this reason Kohler called this law the law of culture or the modern law of nature; where the classic natural law was eternal

concept of sovereignty more rigidly than did Kohler, international law, in his construction of it, remained dependent on the acceptance of its norms by the sovereign State. "Völkerrecht ist alles was die Kulturstaaten in ihrem wechselseitigen Verkehr als Hoheitssubjekte anerkennen," *System der Rechts- und Wirtschaftsphilosophie*, 1904-1907, III, 325. Both Berolzheimer and Kohler contended that a State cannot submit its vital interests and destinies to any form of international arbitration or adjudication. *Ibid.*, p. 382; Kohler, *Völkerrecht*, p. 14.

<sup>71</sup> *Rechtsphilosophie*, p. 144. Cf. pp. 206 ff.

and unchanging, the modern cultural law adapts its content to the total situation in which it must function.<sup>72</sup> It is, however, essentially always rational, and presents the broad outlines of the rational means for the solution of difficulties. Where it is irrational it is so only in retaliation for the previous irrationality of others, as in reprisals.

Kohler's treatment of war under this new cultural law is a little confusing, since it appears at once legal and beyond law. Kohler flatly rejected the idea that the legal relationship between States was severed by the outbreak of war, and yet he constantly dealt with war as beyond law. The solution seems to lie in his statement that war belongs to those relations beyond law "from which indeed legal consequences ensue, but which are conditioned for the most part not by legal, but by factual circumstances. Such relationships belong indeed to law, but law appears in them only from time to time without being the determining element."<sup>73</sup>

A dangerous principle of "cultural" law stated by Kohler was that generally the lower interest must give way to the higher. This principle he developed chiefly in relation to the law of necessity (*Notrecht*) in the sphere of international law. He argued that since the right of self-defense justified otherwise illegal acts on the part of the individual, the same right must be maintained for the State. The State whose existence is at stake is justified in violating the rights of neutrals as well as of its enemies. Its right to existence has preference over law and over its previous obligations. For the existence of the State, he insisted, "everything and everybody is to be sacrificed. Here there are no higher interests to which the existence of the State might be subordinated, here there does not even exist the possibility, which exists for the private citizen, of the State's sacrificing itself in spite of its right to self-defense and renouncing that right. Because for the State existence is not only a right, but a sacred duty: the unconditional duty of self-preservation holds for the State since in the State is contained a

<sup>72</sup> *Grundlagen des Völkerrechts*, pp. 3 ff.

<sup>73</sup> *Ibid.*, p. 171.

great fullness of cultural forces the preservation of which is entrusted to it."<sup>74</sup>

The essential shortcoming of such a construction of international law, as Kohler himself admitted, is of course that one is thrown back entirely upon the good will and respect for justice of the parties concerned. The right of appeal by any State to the weapons of self-help and so ultimately to war is left to the sovereign conscience of the State, and its decision as to the justice of its cause is a final decision. Normally men and States will bow to the claims of justice but, as Kohler said, "there are times when humanity itself is filled with pathological criminal impulses, and the peoples tread law and order underfoot like bandits." It is at these very times that the claims of objective justice most require organized and effective support, but such support is not to be derived from the principle of self-help as applied by sovereign States.<sup>75</sup>

A stronger stress was laid on the principle of sovereignty as an indispensable element of the State by Fritz Berolzheimer, one of Kohler's associates. For him sovereignty and State were wholly inseparable. The State he regarded as, on one hand, autonomous legal rulership (*Rechtsherrschaft*), and, on the other, as the frame within which all culture arose and existed. Legal rulership, derived from no higher earthly power, independent and unconditioned, he held to be the characteristic feature of the State. "A non-sovereign State," he wrote, "is exactly as much a State as a man without a head is a man: the torso is there, the essential thing is lacking."<sup>76</sup>

<sup>74</sup> *Not kennt kein Gebot*, 1915, p. 33 (written largely in defense of Germany's invasion of Belgium). *Rechtsphilosophie*, p. 212. *Völkerrecht*, pp. 130-131, 172. In the same way Kaufmann saw the State as always standing above its treaties, observance of which must be subordinated to its interests.

<sup>75</sup> Cf. *Völkerrecht*, pp. 11-12. In the *Rechtsphilosophie*, p. 212, Kohler conceded that these considerations made modern international law a *Halbheit*.

<sup>76</sup> *System der Rechts- und Wirtschaftsphilosophie*, III, 196. Cf. pp. 18 ff., 193 ff. In this *System* Berolzheimer set himself the task of establishing the relation between *Wirtschaft* and *Recht*, and, in much the same fashion as Stammler, arrived at the conclusion that the former was content, the latter form. "Law without *Wirtschaft* is empty, *Wirtschaft* without law is formless." Stammler was concerned chiefly with demonstrating the inde-

The idea of force or power played a great part in Berolzheimer's speculation, and he tended to identify *Kultur* and *Kraft*. All culture resulted in increased human power; legal culture heightened the power of men by constructing and maintaining organized rulership. Thus Berolzheimer saw the proper end of all political action as the development and strengthening of the forces existing in the State. This led him, in contrast to the majority of those active in the new philosophical movement, to the view that the source of objective law is "always a factual condition of power-rulership or some other manifestation of power. . . . The subjective (psychological) attendant moment of belief in law (*Rechtsüberzeugung*) is a mere medium for the assertion of rulership."<sup>77</sup>

The general tide of juristic opinion in the first two decades of the present century in Germany was strongly against the attempt, as made by Berolzheimer, to identify law with the coercively enforced will of the State. The positivists who had clung to the positive law as dictated by the State had had their day, and the philosophers who succeeded them sought a far broader basis for their science. As early as 1894 an elaborate theory of law had set out from the principle that "law in the juristic sense is in general all that which men who are living in some sort of community together mutually recognize as norm and rule of this common life";<sup>78</sup> and views equally destructive of the notion of the

pendence and formal self-sufficiency of law; Berolzheimer as a Neo-Hegelian on the contrary sought the filling out of the formal juristic concept with its material content.

<sup>77</sup> *Ibid.*, p. 117. He appears to regard all law as law imposed from above, but the harshest forms of this *Herrschaftsrecht* he believed to have been eliminated through the appearance in law in modern times of an ethical element which insists that even the legal subject shall be regarded as a free person; *ibid.*, p. 151; *Deutschland von Heute*, p. 115. He remarks elsewhere that all culture is aristocratic while all democracy is degenerated aristocracy.

<sup>78</sup> Ernst Rudolf Bierling, *Juristische Prinzipienlehre*, 1894, I, 19. It should, however, be remarked that the "recognition" of law postulated by Bierling has little to distinguish it from the coercive imposition of law (*cf.* Felix Somló, *Juristische Grundlehre*, 1917, p. 139), but Bierling does for the most part succeed in separating the concept of law both from the will of the State and from the element of coercion.

The derivation of the binding power of law from other sources than the

sovereign State as sole author and champion of law became increasingly common with the turn of the century.

### III. OTHER PHILOSOPHICAL THEORIES

Two more contemporary jurists—Felix Somló and Max Wenzel—may also be mentioned here as having contributed to the general philosophic reaction against the era of positivistic interpretation and construction, although they are scarcely to be classified as belonging to either of the two chief philosophic schools.

Somló, like the critical section of the Neo-Kantians, designedly turned away from the content of law and directed his attention solely to its form, to what could be known of a legal norm wholly irrespective of content. His work did not, however, share the purely formal character of that of Kelsen and Sander. On the contrary he insisted that the recognition of a question as metajuristic by no means eliminated it from jurisprudence and that it was impossible to wring a solution of all the problems of law from the technical juristic method.<sup>79</sup> The concept of sovereignty necessarily played a larger part in Somló's system than in that of many of the philosophical jurists since he saw it as an essential element of any theory of law, and in fact defined law as "the

State and its might was indicated even earlier by Karl Binding in the essays collected in *Zum Werden und Leben des Staates*, 1920. See also his *Die Normen und ihre Übertretung*, 2 vols., 1872-1877; August Thon, *Rechtsnormen und subjectives Recht*, 1878; Adolf Merkel, *Juristische Enzyklopädie* 1st ed., 1885, 5th ed., 1913, and *Fragmente zur Sozialwissenschaft*, 1898-1899.

Max Ernst Mayer, *Rechtsnormen und Kulturnormen*, 1903, puts forward the interesting theory that legal norms as such are binding only upon the organs of the State and instruct the latter as to the action to be taken or sanctions to be applied in certain specific circumstances. That which is binding upon the individual as a member of the community is the body of *Kulturnormen* representing the general stage of cultural development at which the community has arrived. The law must be on the whole in accord with the *Kulturnormen* and merely attaches consequences to their breach.

<sup>79</sup> See his *Juristische Grundlehre*, 1917, pp. 1-2. With special reference to Kelsen he remarked that "die Frage, was Recht und Staat heisst, lässt sich für die Jurisprudenz nicht einfach als ein nur in unzulänglichen Bildern zu veranschaulichendes Wunder abtun," *ibid.*, p. 25. Cf. Max Wenzel, *Juristische Grundprobleme*, 1920, p. 147, note 1.

norms of an habitually obeyed, comprehensive, and stable power."<sup>80</sup>

Although it might seem at first sight as if this definition spelled a return to the view that law was essentially the command of a determinate superior, such was far from the construction put upon it by Somló. The answer is to be sought in Somló's peculiar usage of the conception of highest power. It is true that he considered highest power to be a power which was able in general and more successfully than other powers to bring its commands into effect, but this did not hinder him from claiming that in a state of anarchy there was no less a highest power than in an absolute monarchy. The reasoning here, however, appears to proceed in rather circular fashion. In a condition of philosophic anarchy there would be norms followed by the members of the community; an ordered society is considered little less desirable by the anarchist than by the authoritarian. Since there are such norms regulating a wide sphere of life and habitually obeyed, and since norms of this order have been described by Somló as legal norms issued by a highest power, he appears to conclude that there must be such a power in the anarchic society. His analysis leads him to the conclusion that the collectivity (*Gesamtheit*) is this power, determining law through the agreement of all.<sup>81</sup> Although Somló is to be commended for his elimination of the element of compulsion as a necessary feature of law, it is more doubtful that his view of anarchy as a society ruled by legal norms laid down by a highest power can be held to have much significance.

So long as norms were obeyed Somló regarded them as proceeding from a highest power (*i.e.*, a power able to enforce its norms as against other powers), no matter in what manner they were issued or how obedience to them came about. Thus law is not derived from power in general, but only—and here again the circle is obvious—from power which makes and enforces law.<sup>82</sup> The exact content of this

<sup>80</sup> *Ibid.*, p. 105. It will be seen from this definition that Somló was well read in the English jurists, notably Austin. While the majority of the German writers reserved their comment and criticism for their fellow-countrymen, Somló went much farther afield.

<sup>81</sup> *Ibid.*, pp. 100 ff.

<sup>82</sup> *Ibid.*, pp. 109-111.

variety of power Somló conceded to be a question too involved for exact settlement—force, ethical considerations, conviction, interests, and innumerable other factors all combine to place a power in such a position as to issue norms which are habitually followed.

It has been indicated that Somló saw the necessity of tearing apart the Neo-Kantian veil between jurisprudence and metajurisprudence. A jurisprudence which refused to go back to the social realities lying behind law reminded him, he said, of "the anecdote of that Kaiser who, when the outbreak of a revolution was announced to him, is said to have asked: 'Very well, but is that allowed?'" With special emphasis he insisted against Kelsen that the ultimate foundation of a system of legal norms could never be a norm of this system. On the contrary it must be a social fact, an historical event, which places power in certain hands and organizes it in a certain way. To understand a given system of law, Somló sensibly maintained, one must undertake historical social research into its real origins and into the power-situation out of which the highest power developed.<sup>83</sup>

Law, Somló has established, is derived from highest power, and he proceeds to derive the State from the adherence of a society to the norms of such a power. Where there is a legal power there exists both State and law: "the norms of this definite variety of power are the law, and the circle of those through whose obedience the power has become that kind of a power, is the State."<sup>84</sup> The highest power has a "real" social-factual existence, according to Somló, but the State he holds with Kelsen to be purely a legal construction; its personality is only juristic, its will is a construction for Kelsen's *Zurechnung*, and one can read no more out of the State than the legal norms have put into it.

For Somló the problem of the *Selbstbindung* of the State naturally becomes that of the *Selbstbindung* of the highest power. His answer is no more satisfactory than that of

<sup>83</sup> *Ibid.*, pp. 312 ff. Such considerations do not, of course, invalidate the critical and logical derivation of law from itself alone, but they tend to show that the value of the latter method does not extend far beyond the realms of the formal-conceptual.

<sup>84</sup> *Ibid.*, p. 252.



others who set out from the same general presuppositions. In the first place he divides legal norms into two kinds: command norms which lay down rules for those subordinated to the highest power, and promise norms (*Versprechensnormen*) which govern the actions of the highest power itself. These latter he holds to be legally binding on the highest power when given explicitly to its subordinates. Why they should be legally binding is inadequately explained, although the ethical obligation to fulfil a promise is allowed to play a considerable part.

It is, however, the highest power itself which binds itself and which is the source of law. All the properties which help to lift it to the rank of highest power Somló regarded as constituting sovereignty, a concept the normative and factual aspects of which he then distinguished. The highest power is, he held, sovereign in a real causative sense: its norms are in fact habitually obeyed. But, he continued, "if this power and its will are now ascribed either conventionally or juristically to the State, then there arises in addition a new normative—conventional or juristic—concept of sovereignty, which brings to expression no reality but a norm (*Regelung*).” The factual and the normative concepts might in the particular society be almost wholly unrelated to each other, he admitted, but he was unable to do more than state that "this difficult and important problem of every theory of public law" could only be treated in relation to the circumstances of a given society.<sup>85</sup> And indeed, from the very nature of the problem, it is impossible to arrive at any more general or precise solution.

In his construction of international law Somló put forward an ingenious but by no means wholly satisfactory theory. It was an inevitable conclusion for him that sovereignty should be held an essential element of the concept of the State: in fact it is already contained in his definition of the State as a community obeying norms laid down by a highest power. By allowing the factual element to enter in, however, he had no alternative to the admission that there might be a power over the highest power issuing norms

<sup>85</sup> *Juristische Grundlehre*, 1917, pp. 280-285.

which the latter obeyed. The saving clause for Somló was that this second power could not be a legal power (since, if it were, it would itself be sovereign); that is, the norms which it laid down could not be so numerous and comprehensive as to make it a highest power in the sense of law. This consideration brought him safely through the international sphere. The sovereign States of the world, he contended, are subordinated to a higher power constituted by their unanimous agreement, but this power is not a legal power since it is not stable and the norms which it issues are not sufficiently comprehensive. For these reasons Somló felt it necessary to deny the character of law to the norms governing international affairs, even though they were issued by a higher power standing above the several States and were binding upon the States.<sup>86</sup>

Whatever the shortcomings of Somló, he appears to have taken advantage of some of the more valuable suggestions of the philosophic jurists and to have caught the spirit of the new day. The same can scarcely be said of Max Wenzel, whose theories have the ring of an attempt to lead the philosophy of law back into the earlier positivism and materialism against which it had revolted.

Somló's derivation of law from power was in large part a formalistic construction, as was evidenced by his treatment of anarchy; when Wenzel, on the other hand, made the will of the legislator the decisive factor in law he was dealing far less in formalisms than in empirical realities. It is only fair to state, however, that Wenzel nominally limited the scope of his inquiry to the concept of statute law (*Gesetzesbegriff*) in so far as it could be derived from examination of the laws of a State whose State-character was unquestionable—Prussia prior to her entry into the North German Confederation. But Wenzel was also strongly inclined to equate this concept with that of law in general, arguing that in modern times virtually all law was statute law. In his view the legislator, *i.e.*, the author of statute law, stood above all the norms of his system and was in a position both to frame and to alter them at his pleasure. The legislator, he wrote,

<sup>86</sup> *Juristische Grundlehre*, 1917, 5<sup>tes</sup>. Kap.

"is the central will in the system of norms. The validity (*Geltung*) of all the imperatives of a system stands in the will of one and the same instance. . . . The unity of a norm-system consists in the subordination of all its norms to the will of one and the same instance, to one central will."<sup>87</sup> Furthermore, the legislator himself determines what circle of persons shall be subordinated to his will, and can claim from this circle unlimited obedience: "he claims power over them of unlimited extent and claims from them unlimited readiness to obey."

These presuppositions naturally led Wenzel to make sovereignty a central part of his thought, although he did not go so far as to assert that every legislator must necessarily be sovereign. Sovereignty in his definition "is the denial of the subordination of the highest instance of a community to the will of a higher norm-giver in relation to the validity of its norms"; that is, no other legislator has the power to abrogate the validity of the norms of the sovereign without or against the latter's will. Hence sovereignty is a relation between legislators: "it means that in a system of norm-setters the sovereign stands in such relation to every other legislator that he can set aside the proper validity of the other's norms, while he himself stands in no such relation to any other norm-setter."<sup>88</sup> Wenzel is further insistent that the hands of the sovereign may be tied by means of imperatives which he has directed at himself.

Applying his theory of sovereignty to the State, Wenzel concurred in the opinion that there might be both sovereign and non-sovereign States. "The person of the State," he wrote, "is a territorial corporation, which is established through the norms of statute law, and is either endowed with comprehensive and sovereign rulership (*Herrschergewalt*) or is analogous to a sovereign State person taken by and large, *i.e.*, possesses a corresponding fullness of rulership and constitutive autonomy."<sup>89</sup> The difference between the

<sup>87</sup> *Juristische Grundprobleme*, 1920, p. 141.

<sup>88</sup> *Ibid.*, pp. 180-186.

<sup>89</sup> *Ibid.*, p. 233. There was a growing movement, discussed in more detail below in relation to the new constitution, to abandon the attempt to find a juristically satisfactory distinction between central State, member-State, and

sovereign and the non-sovereign State he saw as essentially the general impression created by the latter: if on the whole it closely resembled a sovereign State, then it was to be regarded as a State. It is, however, evident throughout Wenzel's work that although he was fundamentally of the opinion that the State was ultimately to be distinguished from other like bodies only through its possession of sovereignty he was forced by the troublous dilemma of federalism to abandon the position that the State must necessarily be sovereign in the sense of having legally highest power over everything within its sphere. His treatment of federalism in the new Reich threw no particular light on the situation since he wisely refrained from committing himself too seriously in any direction. He did, however, hesitantly propose that the *Länder* should still be regarded as States even though their claim to that title were somewhat dubious.<sup>90</sup>

Wenzel's theory of sovereignty led him to the perhaps logical but always somewhat surprising conclusion that law existing above the State was not to be reconciled with the sovereignty of the State-person, since sovereignty means the denial of any higher system of norms. Having set out from the concept of statute law, he clung to it with dogged persistence and constructed his theory of international law on this basis. The sovereignty of the State excluded the possibility of law superior to it, yet Wenzel was not minded to destroy the law-character of international law. But if the norms of the latter do not derive their validity from some source superior to and independent of the States, it must be that each State itself is the source of the validity of its international law. As he briefly stated his proposition: international law is inner-State law, distinguished from the latter

local community in federalism. Refuge was increasingly taken in some such phrase as Wenzel's "*Gesamteindruck*," a modification of the conclusions earlier arrived at by Rosin, Brie, and Jellinek.

Wenzel distinguished two aspects of the State: as a factual reality he held it to be a community of persons living under a certain system of law; while as a juristic person it was for him, as for Kelsen and Somló, a mere point of legal attribution, having no other significance or content than that attributed to it by law.

<sup>90</sup> *Ibid.*, pp. 290-336. His ultimate timid conclusion was that the member-States are *Grenzfallstaaten* while the Reich is a *Grenzfallbundesstaat*.

only by the way in which it arose. In effect two or more States make the same norm a part of their inner law not accidentally but designedly, that is, the coincidence that a particular norm enters into both systems occurs through prior mutual agreement. The problem as to whether or not international treaties are to be respected, Wenzel asserted must be answered through examination of the explicit or implicit provisions of the law of the State concerned from which both treaties and the norms derived from them secure their validity for that State. This, he conceded, opened the door to an act on the part of a State which would be legal as far as its own law went, and yet illegal in relation to its partners in international law.<sup>91</sup>

### THE TWO SCHOOLS

Generalizations, other than the most obvious, about the philosophical jurists are rendered exceedingly difficult, if not impossible, by the fact that there was so little measure of agreement among them. It is not without interest, however, to notice how closely each of the two schools adhered to the spirit, and in some cases even the letter, of its patron-philosopher. The Neo-Kantians were essentially critical in spirit, where the Neo-Hegelians tended to be dogmatic. As Kant had remained within the tradition of natural law—even though his doctrines spelled a breach with it,—had pleaded for eternal peace, and had found little of the divine in sovereignty, so did his followers turn to the moral claims of “right law,” abandon the omnipotence and omnipresence of the State, and at least blunt the horns of the “golden calf” of sovereignty. For the Neo-Hegelians, on the other hand, with the partial exception of their greatest figure, Josef Kohler, State and sovereignty were very real and substantial concepts embodying the best that life held. In the hands of some, not eternal peace but the sovereign State waging victorious war became the ideal toward which men should strive; but it would be grossly unjust to lay the sins of Lasson and Kaufmann on the heads of all the followers

<sup>91</sup> *Ibid.*, pp. 500 ff. Wenzel dealt at some length with the problems arising from Art. IV of the Weimar Constitution, pp. 468 ff.

of Hegel. The vices of the two schools correspond to their virtues: the Neo-Kantians in their attempt to free jurisprudence from the metajuristic considerations of politics and sociology, tended to formalize and overintellectualize the substantial realities with which they dealt. The Neo-Hegelians, on the other hand, attempting to bring new life to jurisprudence by linking it up with the new world discovered by sociology in the broadest sense, were in constant danger of lending too independent and robust a substance to their forms and concepts.

## CHAPTER VI

### THE NATIONAL ASSEMBLY AND THE WEIMAR CONSTITUTION

THE return to the philosophy of law was obviously the outstanding event in German jurisprudence in the two decades preceding the outbreak of the Revolution in 1918. The founding of the Empire had led to a long period of merely positivistic interpretation. This speedily reached its greatest heights under the leadership of Jellinek and Laband, and by the end of the century amounted to little more than an academic dispute over the details of the concepts and formulas which had already been arrived at. Its creative force had largely been spent, and a reëxamination of first principles was necessary before there could be any further progress.

It has been said that the theory of natural law crops up always where there is dissatisfaction with existing law and the existing régime. That the philosophic movement consisted in large part of a reformulation of the conception of natural law has been amply shown above. It is not difficult to guess the principal causes of dissatisfaction among the jurists at this period in Germany. For the growth and flux of an ever changing law there had been substituted the rigidity of codes, which, in the precise form given them, were far from winning the unconditional approval even of those who supported the principle of codification. Furthermore, the identification of right with might had found even more sturdy champions among those to whom the creation and guardianship of law had been entrusted than among the positivistic jurists themselves. If the latter had on the whole identified law with a command issued by a sovereign power, this power had by no means lagged behind in accepting the practical implications of the view. This is not to imply that the German Government was ruthlessly despotic and heedless of the welfare of its subjects, but that it thought always in

terms of the authoritarian principle; it was, as Preuss vigorously contended,<sup>1</sup> an *Obrigkeitsystem* based on the *Obrigkeitsstaat*. Governing was regarded as the business of a select few, and any interference with these latter on the part of the people was considered an unwarranted intrusion.

In the sphere of public or constitutional law especially there was great cause for dissatisfaction. The exhaustive critical analysis to which the 1871 constitution was submitted by the jurists was in the last analysis largely an academic exercise since the constitution itself in many points tended to conceal the machinations of the real political powers. The pious declaration of the Bundesrat as the sovereign organ of the Reich and of the Kaiser as merely an executive organ can scarcely be held to correspond to the real political facts of the situation. Much of the old monarchical principle lived on intact, fitting itself when it became necessary to the forms of the constitution, but often politely ignoring them. The Kaiser regarded himself as the father of his people, and acted accordingly even though it must be recognized that time and again his personal desires were severely checked by other factors in the Government, especially during the latter part of the War when effective power passed from him into the hands of an irresponsible military clique. As a result the theoretical solution of the last juristic problem of German public law could bring one not much closer to an understanding of political reality.

The philosophic movement was at once a flight from law which had ceased to embody social and political reality, and an attempt to lay the foundations for a reëvaluation and reshaping of law. As a flight it meant merely a recognition that it was, temporarily, at least, more fruitful to seek after the philosophic implications of law in general than to waste time in the detailed analysis of a public law which bore only

<sup>1</sup> Cf. Hugo Preuss, *Das deutsche Volk und die Politik*, 1915, and *Obrigkeitsstaat und grossdeutscher Gedanke*, 1916. These admirable analyses of German political psychology, history, and fact, combined with Preuss's lifelong and outspoken readiness to champion the *Volksstaat* against the then all-powerful *Obrigkeitsstaat*, gave Preuss a position of great moral and intellectual influence once the Revolution had broken out. Friedrich Meinecke, *Nach der Revolution*, 1920, lends interesting support to Preuss's views.



the most distant relation to the political facts. As a constructive and creative movement, however, its significance was much greater. It ignored the monarchical principle, it shattered the basis of the notion that law was essentially the command of a sovereign power, and it reintroduced the theory that the ultimate test of law must be a value-judgment. But it was not, except in rare instances, a directly revolutionary movement in any sense whatsoever. It was indirectly revolutionary only in that it went far beyond the existing system into a philosophic realm from which it was possible to look down upon Kaiser, Bundesrat, and all the rest, and see them in proper perspective. Furthermore, there were indubitably seeds of trouble in even so carefully qualified an acceptance of the basic principle of natural law—that law must be that which is reasonable and right—as that of the greater part of the philosophers.

### I. THE REVOLUTION AND THE STATE

A strong case may be made for the influence of the eighteenth-century philosophers in preparing the way for the French Revolution; it would be wildly impossible to lay the German Revolution at the door of the respectable German jurists who had turned from empirical analysis to philosophic speculation. Broadly speaking, no one foresaw the Revolution or in any way prepared for it, least of all the jurists.<sup>2</sup> It is of course impossible to measure the indirect influence of the two decades of philosophic thought, but there is every reason to believe it very slight. The progress of the Revolution, the discussion leading up to the new Constitution, that instrument itself and the juristic comment

<sup>2</sup> It is hard to conceive stronger language than that of Walther Rathenau, *Kritik der dreifachen Revolution*, 1919, pp. 9-10: "there is no longer any doubt: what we call the German Revolution is a disillusionment. . . . It was not that a chain was smashed by the swelling of a spirit and a will, but that a lock rusted through. The chain fell off and the freed men stood dazed, helpless, disconcerted, and had to take action against their will. Those acted most promptly who saw their own advantage. . . . There was no revolutionary theory and training. . . . Since Luther German blood has not again dared to play with revolutionary ideas; revolt against authority it has never dared." See also Gooch, *Germany*, p. 161.

upon it, all show virtually no trace of the work of the philosophers.

To political theory in general the German Revolution made one important contribution, but to the theory of sovereignty in particular it added virtually nothing. The outstanding political achievement of the Revolution was the transformation of monarchical sovereignty into popular sovereignty: every other point was debatable, but there was no one to dispute that sovereignty had passed definitively from the crowned heads of Germany to the German people. On the ninth of November, 1918, Prince Max of Baden, the last imperial chancellor, announced prematurely that "the Kaiser and King has decided to abdicate," and on the same day Ebert and Scheidemann proclaimed the German Republic in Berlin: "the new government will be a people's government." Not until the twenty-eighth did there come the official word from the former Kaiser: "I herewith renounce for all time all rights to the crown of Prussia and the rights connected therewith to the imperial crown." In the interval every other throne in Germany had fallen, and the people were in full command of their own destinies.<sup>3</sup>

The transition to popular sovereignty did not, however, in itself serve to work any fundamental change in the theory of sovereignty. The possibilities of this form had been too widely explored both in Germany and elsewhere to allow new discoveries to be made in relation to it. Furthermore, the theory of popular sovereignty had never seriously been excluded in Germany even though the discussion of it had remained largely academic, due in part to the actual political situation and in larger part to the approval generally felt in Germany for the principle of monarchy. Bornhak comments quite correctly that "despite all the influence of the theory of natural law and of modern radicalism the principle of popular sovereignty had never up to this time

<sup>3</sup> In addition to the many histories of the period, Walter Jellinek's "Revolution und Reichsverfassung," *Jahrbuch des öffentlichen Rechts der Gegenwart*, IX, 1920, gives an admirable brief juristic view of the events leading up to the adoption of the Constitution, as well as an almost exhaustive bibliography of the contemporary literature. A similar review usually prefaces the other later works on the Constitution.

been able to put itself through effectively in Germany. . . . The German States rested from the time of absolute monarchy on the monarchical principle according to which all the rights of political power are united in the person of the monarch and every right and every duty of the State refers back to the physical person of the monarch. The transition to the constitutional system altered nothing of this. The constitutions found their legal basis in the legislative right of the monarch who until then was usually absolute. He did not govern on the strength of the constitution, even if restricted to its limits, but the constitution existed on the strength of his will.”<sup>4</sup>

While all this is true, it is equally true that, as has been pointed out above, the coming of the constitutional era brought with it the formal substitution of the State for the monarch as the real subject of sovereignty. The monarch became a part of the State, the bearer of the sovereignty which formally inhered in the State, and ceased to be either above and outside the State which he ruled, or to sum up the whole State in himself. Once the constitutional era had begun it was impossible to regard the monarch as sovereign in the same absolute way that had been possible before: his sovereignty came increasingly to be in debt to the fictions of the jurists. A further blow was dealt to the theory through the federal constitution of 1867-1871. Here the chief executive was obviously not, from a formal standpoint, sovereign, and the sovereignty of the several monarchs was only tenuously retained through their membership in the Bundesrat. That latter body was, perhaps, sovereign, but it was not a monarch, and the monarchs represented in it could by no means sustain a claim to individual sovereignty.

Even during the imperial period, then, the principle of the sovereign power of the monarch had been to a considerable degree superseded, but unquestionably it continued to throw its shadow over the jurisprudence of the analytical school. For all its abstract formulation sovereignty was re-

<sup>4</sup> Conrad Bornhak, *Grundriss des deutschen Staatsrechts*, 5th ed., 1920, pp. 87-88.

garded as essentially the unlimited and absolute power which now had descended to some other organ.

The philosophers, it has been shown, broke away from this view on the normative side as the sociologists broke away from it on the descriptive side. As Kelsen, following the sociologists, pointed out, absolute sovereignty had no place whatsoever in a science which followed out the chain of causation.<sup>5</sup> Even from a normative standpoint the philosophical jurists had no use for a theory of sovereignty that retained too much of the flavor of its monarchical origins. Sovereignty was for them an abstract formal principle almost wholly unrelated to the concrete absolutism which Bodin had described. The concept of sovereignty gained in strictness of formulation while it lost in strictness of application.

This latter loss was apparent in German jurisprudence in general even before the Revolution. Half a century's voluminous efforts to save sovereignty on the monarchical basis for the modern federalistic world had demonstrated as conclusively as need be that the task was virtually impossible. To accomplish it meant that, by means of fictions, one had transformed the constitutional federal State into an absolute State of the classic type. In relation to federalism, as will be discussed at greater length below, there were marked signs of a reversion to the traditions of the *Federalist*, de Tocqueville, and Waitz. By the time of the Revolution there was unquestionably a juristic weariness with the attempt to cram the new world into the old forms. For jurisprudence in general this meant a widening of horizons and a breach in spirit with juristic scholasticism; in consequence the concept of sovereignty was relegated to a position of considerably smaller importance than before and was tended with less meticulous care.<sup>6</sup>

<sup>5</sup> This was generally recognized by the earlier jurists, but the spell of the monarchical principle helped to blind them to the necessity of a sharp methodological distinction such as that insisted upon by the Neo-Kantians.

<sup>6</sup> Even before the War the precise concept of indivisible sovereignty had been attacked by some thinkers: "Almost everywhere one sees the chief affairs of the State in the hands of several powers, which are independent of each other and which support, influence, and limit each other in the most diverse and complex fashion," commented Richard Schmidt, *Allgemeine Staatslehre*, II Bd., II Tl., 1903, pp. 843 f. The tasks and powers of the

The formal principle of sovereignty played virtually no part in all the discussion that raged around the framing of the new Constitution. There was none to plead for anarchy and none who bothered to attack the principle that the "State" should be "sovereign." Furthermore, the monarchic principle had been eliminated from practical politics for the time being: the few voices that were raised in its favor in the two or three years following the Revolution were apologetic and ready to admit that the democracy which they distrusted was the order of the day.<sup>7</sup> The rather conservative-minded Democrats, while protesting that they had been no opponents of monarchy, recognized that "one foundation-stone which we cannot fit into the new structure is monarchy. . . . When the tree is lying on the ground after having been uprooted, it is impossible to set it up again."<sup>8</sup>

State are too various, Schmidt held, to allow them profitably to be lumped together as *Staatsgewalt* or sovereignty. He further argued that sovereignty represented only a relative or comparative concept—sovereignty meant only that some person had legally higher power than another. It follows, he wrote, "that the so-called problem of sovereignty is merely a general name for a number of different questions related to each other but to be examined independently," *op. cit.*, pp. 849-850.

Adolf Arndt also shows the same tendency to break away from the too rigid construction of sovereignty: "The principle that sovereignty is conceptually indivisible and illimitable is a phrase in contradiction with the facts, especially of international law," *Die Verfassung des deutschen Reiches*, 2d ed., 1921, p. 15, note 2.

<sup>7</sup> Friedrich Naumann's *Der Kaiser im Volksstaat*, 1917, gives roughly the general position adopted either through conviction or force of circumstance by the right wing after the Revolution when Naumann himself had shifted further to the left. Clemens von Delbrück in his speeches in the National Assembly represented the best of this post-revolutionary right-wing opinion. Naumann, a year before the Revolution, said—as indeed did many others—that the monarchy was in no danger as far as internal politics went and that the Kaiser could stand independent and unsoiled above the clash of classes and interests, but he insisted that the future must see an extension not of absolutism but of the idea of the "*Kaiser im Volksstaat*." Delbrück maintained that the monarchy might fruitfully have remained under the conditions imposed in the period just before the Revolution.

<sup>8</sup> Cf. Koch's Democratic program-speech at Weimar, February 28. *Verhandlungen der verfassungsgebenden Nationalversammlung* (hereafter: *Nationalversammlung*), p. 393A. In the same vein, Fritz Stier-Somlo, *Republik oder Monarchie im neuen Deutschland*, 1919, who, despite a leaning toward monarchy "weil sie ihrer Aufgabe gewachsen ist," held that the monarchy was no longer deep enough rooted in the people to give it its necessary dignity and authority, pp. 14-16, 41 ff.

There was general agreement with the view expressed by Hugo Preuss that even if the pendulum should swing back, the classic monarchical principle would be shattered, and the new monarchy would have to be founded explicitly on popular consent.

Here lay the essential difference between the problems of 1848 and 1919: excluding the issue of federalism in each case, the one centered about monarchy vs. democracy, the other about Social Democracy vs. bolshevism. The year 1848 was essentially concerned with the freedom of the individual, with the abolition of individual or class political privileges, and with the Bill of Rights which so largely contributed to its lack of success. In 1919, as Hermann Oncken noted, "the center of gravity of the movement has shifted from the political to the social, and instead of the form of the State the form of society will be the final goal of the struggles of the future."<sup>9</sup> Thus where sovereignty—of monarch or of people—played a great part in the *Paulskirche*, it dropped almost out of sight at Weimar and in the events preceding Weimar.

It has been said by one of the tried leaders of Social Democracy in Germany that the essential issue of the Revolution was the conflict between two fundamentally different conceptions of socialism and of social evolution.<sup>10</sup> The sov-

<sup>9</sup> "Die deutsche Nationalversammlung 1848 und 1919," in *Recht und Wirtschaft*, January, 1919, p. 6. Cf. also the Social Democrat Vogel, *Nationalversammlung*, pp. 458C ff. He saw as the goal of the 1918 Revolution the freeing of the working class and "the erection of a socialist republic by means of democracy."

Johann Viktor Bredt, *Der Geist der deutschen Reichsverfassung*, 1924, pp. 32-33, points out how closely Preuss in his *Das deutsche Volk und die Politik*—the book which made his draft constitution of outstanding importance—clung to the principles evolved by the Liberals of 1848 which had been inscribed on the banners of German liberalism ever since.

Cf. Otto Meissner, *Das neue Staatsrecht des Reichs und seiner Länder*, 1921, p. 15.

<sup>10</sup> Cf. Eduard Bernstein, *Die deutsche Revolution*, 1921, I, 5-6. Also Marcel Berthelot, *Works Councils in Germany*, 1924, p. 9.

This conflict is integral to the substance of Marxism, and the two opposing groups each naturally attempted to find justification in the gospel as laid down by Marx. No attempt will be made here to go into this interminable debate on the precise meaning to be placed on certain passages of Marx and Engels. The Communists, headed by the Russian leaders, main-

ereignty of the people had come, and with it, as a necessary consequence, democracy. But "democracy" had two extreme meanings and many shades of those two in between: Was democracy to be the rule of the whole people through the ballot box and the parliament, or was it to be democracy on the Russian model, the democracy of the proletariat? It was on this line that the Revolution was fought. The majority of the Socialists and the parties on the right defended the principle that the whole people must determine its own destinies and shoulder its own responsibilities: as one Socialist speaker said, no more socialism shall be imposed than the people themselves freely want. To this the groups on the left replied that the vanguard of the proletariat must safeguard the fruits of the Revolution for the proletariat and crush out the swift-growing weeds of capitalism which would again overwhelm the workers if substantial economic and social despotism were allowed to coexist with formal political freedom.

### THE RÄTESYSTEM

At the heart of this problem lay the question of the future of the councils or soviets (*Räte*) which had virtually taken charge of the political machinery at the outbreak of the Revolution. It was the theory of these councils which constituted the one important contribution to political thought referred to above. "The council idea," so conservative a member as Clemens von Delbrück told the National Assembly, "is the sole new political idea which the Revolution has yet brought forth, and more particularly the sole new political idea of the draft constitution as it is at present, since for the rest the constitution is nothing but a modern revision of the ideas of 1789 and 1848."<sup>11</sup>

tained that Marx had advocated violent revolution culminating in the dictatorship of even a minority proletariat, while the German Social Democrats, with Karl Kautsky as their chief spokesman, defended the thesis that Marx had predicted the coming to rulership of a majority proletariat through democratic means. Support for either side can be found in the Marx-Engels writings, but there is little doubt that the latter view better represents the general trend of the Marxian thought.

<sup>11</sup> *Nationalversammlung*, p. 1772D. René Brunet, *The German Constitu-*

The formal relation of the council system to sovereignty was very slight: certainly there were none in the first two years of the Revolution to trouble themselves seriously about it. The council system recognizes the formal principle of sovereignty quite as effectively as the parliamentary democracy to which it was opposed. Sovereignty is best to be understood by comparing it with its logical opposite, anarchy. A system built on the basis of anarchy can consist only of coördinated groups or individuals above whom there can be no higher power competent to enforce the claims of a greater whole upon its parts. The system built on sovereignty, on the other hand, recognizes that if the whole is to subsist it must be empowered to enforce its claims and to settle rationally disputes between coördinated powers within it which must otherwise be settled ultimately by an appeal to force. The council system with its hierarchy of councils clearly fulfils the conditions of sovereignty: it is, seen from outside, a self-governing community and internally it provides amply for redistribution of functions and for the settlement of conflicts arising under the status quo. Where sovereignty rests within the system it is scarcely more possible to decide than in the case of, say, the United States. In a sense highest power is vested in the final Congress of Councils, but this body, more than the usual parliament, is subject to fluctuations of popular opinion, and its highest power is customarily exercised by the Central Council and the Commissars of the People. From another standpoint sovereignty rests in the people—a theory of somewhat greater formal significance for the council system than for the usual parliamentary democracy—but, as in federalism, it is less the people as a whole which is important than the people as divided into the electorates for the lowest functional and geographical councils.

It were only Dry-as-Dust himself who could linger long over the problem of the formal principle of sovereignty in

*tion*, 1923 (tr. by Joseph Gollomb), p. 294, asserts that "the idea of the councils is probably the only really new idea that has appeared in the public law of modern States since the war." See also Max Cohen, "Der Rätegedanke im ersten Revolutionsjahr," in *Sozialistische Monatshefte*, 58 Bd., 1919, p. 1054.



the council system. Its relation to sovereignty was far more intimate than ever the study of formal principles would disclose. Not formal sovereignty was at stake, but the actual concrete sovereignty which had been given into the hands of the people by Prince Max and the Revolution. The councils were for many, radical, moderate, and conservative, both the means by which the people could most effectively keep in their own hands this new-found power and the best means for eliminating the flaws which were seen in the conventional "pure democracy" of the West.

The essential difficulty in discussing the council system is the vast variety of different meanings given to that term in the course of the Revolution and after.<sup>12</sup> At least two divisions of primary importance are possible. On one hand there were those who wished to replace the whole existing system by a council system, and those who merely wanted to escape particular difficulties by a judicious application of it. On the other hand the council system was regarded as one applicable throughout both the political and economic spheres or as applicable only to the economic. From this latter standpoint the council system had had no less respectable a protagonist than Bismarck; that is, the great chancellor had struggled for years to secure an economic council based on what might be called a rudimentary economic constitution.<sup>13</sup>

For the present study the most significant distinction is that between the two groups which may be called the radicals and the moderates. The former were, roughly, all those who during the War and after had split off from the Social Democrats to the left. To this radical left wing the councils represented the means by which the victorious proletariat was to safeguard and increase its triumphs and to keep not only the form but the substance of power as well in its grasp. Clearly the source of inspiration here was Russian: the radicals borrowed from across the eastern border the machinery

<sup>12</sup> Franz Gutmann, *Das Räte-system*, 1922, gives an interesting analysis of the chief proposals for the utilization of the councils. His schematic division, pp. 158-163, has been in part followed here.

<sup>13</sup> Cf. Julius Curtius, *Bismarcks Plan eines deutschen Volkswirtschaftsrates*, 1919; Heinrich Herrfahrdt, *Das Problem der berufsständischen Vertretung*, 1924, pp. 58-83.

which had been so conspicuously successful there.<sup>14</sup> As far as the general principle of organization went nothing was added to the Russian model. There was to be a hierarchy of councils based on the local workers' councils and culminating in the final Congress of Councils in which political power was to be vested. This Congress again elected a Central Council which appointed and controlled the Commissars of the People. The whole "working" population of the country was to be qualified to take part in political affairs—much, of course, hangs on the precise meaning to be given to the term "working." The principle of the separation of powers was to be abandoned, and the tenure of all offices was to be at all times subject to the will of the electors to that office.

To the radicals the council system avowedly meant the chosen instrument for the dictatorship of the proletariat, be it minority or majority. This view was opposed from two different moderate standpoints, both up in arms against the proposal that the newly won freedom of the German people should be so speedily transformed into a dictatorship of any sort. The great majority of the Social Democrats, the Democrats, and the Center held firm to the view that Germany's crying need was the introduction of a full and free democracy based on majority parliamentary rule. But there were still a considerable number of members of these parties who contended that the council system in one form or another should be preserved in the formal political organization of the new democracy. The real trial of strength, however, lay between the radicals and the parliamentary moderates, while the small group of intellectuals who wanted to join together the best of "pure" democracy and the council system was almost lost from view.

This trial of strength took practical form from the very first in the dispute that arose as to the calling of a national assembly in which sovereignty should be vested until a con-

<sup>14</sup> Brunet, *op. cit.*, p. 79, after discussing the left-wing proposals, comments: "It is, in a word, a copy of the Russian system." It appears to be conceded on the whole, however, that, although the radical leaders fell increasingly under the spell of Moscow, the original formation of the councils was a spontaneous movement essentially uninfluenced by the Russian developments.

stitution had been created. For the Democrats, whether Socialist or Liberal, it was a self-evident proposition that the popularly elected representatives of the people should take control of the situation at the earliest possible moment. "Democracy," Ebert insisted for the Government at the outset, "must be attained wholly and solidly, for with it stands and falls the German Republic. Without democracy no freedom. . . . The only legalization of the Government remains the will of the people. . . . The National Assembly must therefore be created as quickly as possible."<sup>15</sup> In democracy Ebert saw the rock upon which alone the working class could build its house of the future; and the Social Democrats officially proclaimed that they saw in the universal, equal, direct, and secret ballot "the most important political conquest of the Revolution and at the same time the means by which the capitalist social system is to be systematically transformed according to the will of the people into a Socialist one." "The Social-Democratic party," they continued, "demands the promptest calling of the National Assembly."

On the other side the Independent Socialists and the Spartakists were ready to block the way to the National Assembly not only with their pens but with their lives as well. As early as the nineteenth of November, one of their leaders, Richard Müller, achieved a degree of fame by declaring to an assembly of Workers' Councils in Berlin that "the National Assembly is the way to the domination of the bourgeoisie, is the way to battle; the path to the National Assembly goes over my corpse."<sup>16</sup> This last was, perhaps, pardonable rhetoric, but he represented a large body of radical opinion when he said: "We want no bourgeois republic, but a proletarian republic: we want the Socialist republic in the fullest measure. The State's instruments of power are today in the hands of the workers and soldiers. They must not give this power out of their hands. If we were now

<sup>15</sup> Cf. "Die deutsche Revolution," *Deutscher Geschichtskalender*, I, 163-164.

<sup>16</sup> Richard Müller, *Vom Kaiserreich zur Republik*, 1925, II, 84, note 1. Thereafter he was commonly known as "*Leichenmüller*."

to call the National Assembly, that would be to pronounce the death sentence of the Workers' and Soldiers' Councils."<sup>17</sup>

Those who saw clearly and spoke frankly acknowledged that the choice here lay between dictatorship and democracy. It was occasionally admitted from the left wing that, as was proclaimed from the housetops by the moderates, "a compromise between the council system and bourgeois democracy is impossible." To the proposal that the councils should be welded into the constitution which the National Assembly was framing an Independent writer replied that this would mean "a betrayal of the revolutionary spirit. The Constitution is that of the bourgeois-capitalistic State. The inclusion [of the Councils] in it means the same as the mixing of fire and water."<sup>18</sup> The alternative here was obvious: either sovereignty was to be vested in the people as a whole and exercised by them through the customary organs, or it was to be vested in the proletariat and exercised through a hierarchy of councils designedly representative only of the working class.

That which drew the support of the moderate intellectuals to the Council idea was, however, wholly unconnected with this radical demand for the dictatorship of the proletariat. In Russia the councils served primarily as the instrument of the minority dictatorship; in Germany powerful support was also given to the idea of the council system by those who looked rather to the established German traditions than to the practice and theory of the Bolsheviks. It was by no means uncommon to regard the councils as going back to the

<sup>17</sup> *Ibid.* Without attempting to impugn the sincerity either of the Social Democrats or of their former comrades further to the left, it is still not impossible to conceive that their attitudes might have been somewhat different if the former had not believed that the popular vote of the country would give them a large majority and had the latter not been convinced that they were in a minority. The intense pressure exerted by the international situation must also be taken into account.

<sup>18</sup> Cf. a speech by Kurt Geyer quoted in the *Deutscher Geschichtskalender*, August-September, 1919, p. 332; James Broth, *Entwurf eines Programmes der U.S.P.*, 1920, p. 35; Ernst Däumig in the stenographic record of the "II. Kongress der Arbeiter-, Bauern- und Soldatenräte Deutschlands," 1919, p. 169. A good statement of the left-wing case for the Räte, their construction, and their relation to parliamentary democracy was made in the National Assembly by Alfred Henke on March 4.

time-honored principles of Stein and Gneist, both of whom had struggled for decentralization, local autonomy, and the widest possible measure of self-administration.<sup>19</sup>

There were three main tendencies in this moderate thought concerning the council system. The least important for the present purpose, although perhaps the most significant of all in the long run, was the relation of the political to the economic organization of the community. The council system, built essentially upon the functional and not the geographical unit, appeared to offer a means of solution. That industry should be freed from arbitrary political interference, that it should have a strong if not a decisive voice in the political consideration of economic affairs and that the industrial forces of the community should be organized and unified: these were all theses for which a large body of moderate support was to be found. In radical hands the economic and the political constitutions were to be merged into one, whereas the moderates, as notably Max Cohen and Julius Kaliski, wished to erect an economic constitution parallel to the political, culminating in an economic parliament which should act jointly with the political parliament.<sup>20</sup>

The second element of the council system which endeared it to both moderates and conservatives was that it appeared to offer a "German" solution to the problems of democracy. There was a strong tendency to believe that the customary parliamentary system was, "as a product of a past primitive epoch in the life of the State, no longer adequate to the po-

<sup>19</sup> See, for example, an article by Bredt in the *Deutsche Juristen-Zeitung*, April, 1919, pp. 293-296; Friedrich von Oppeln-Bronikowski, *Reichswirtschaftsrat und berufsständische Gedanken*, 1920, pp. 10 ff.

<sup>20</sup> There are innumerable variations of this type of thought. For the radical view see the speech of Oskar Cohn, an Independent, in the Constitutional Committee of the National Assembly on June 2, 1919. *Mündlicher Bericht des 8. Ausschusses (Verfassungsausschuss) über den Entwurf einer Verfassung des deutschen Reiches* (hereafter: *Ausschuss*).

The proposals of Cohen and Kaliski may be found in the *Sozialistische Monatshefte* for 1919. See also Cohen's books and pamphlets of the post-Revolutionary era. The stenographic records of the first "Allgemeiner Kongress der Arbeiter- und Soldatenräte Deutschlands," December 16-21, 1918, and of the second, April 8-14, 1919, in both of which Cohen played a leading rôle, are invaluable as documents of the council movement. Special importance attaches to the speeches of Ernst Däumig.

litical tasks of the present." The council system with its hierarchy of gradually uniting functional interests and groups was held to be organic in nature, while the majority rule of parliamentary democracy was denounced as mechanistic and atomistic. This atomistic parliamentary democracy was seen as alien to the German spirit; it was regarded by many as the political expression of Manchester liberalism and as such unsuited to the German national economy.<sup>21</sup>

Parliamentary government, at least as far as Germany was concerned, was held by no less shrewd a statesman and thinker than Walther Rathenau to be obviously bankrupt: neither economically nor politically could it fit the requirements of modern Germany. Where parliamentary democracy is dead and mechanistic, the councils, it was said, are alive and organic, filled with the creative and productive forces of the community. Rathenau contended that in six months the councils in Germany had shown more spirit and initiative than the German parliaments in fifty years.<sup>22</sup>

Throughout the literature of the council movement there recurs constantly reference to the poet's demand:

'Twere meet that voices should be weigh'd, not counted.  
Sooner or later must the State be wrecked  
Where numbers sway and ignorance decides.<sup>23</sup>

Majority rule by weight of numbers was widely condemned on its own grounds and as "un-German." The community was not to be regarded as the sum of individuals, but as itself an organized if not an organic unity. "Hence it is quite clear," the German argument ran, "that if the popular will is really to be this organism which grows out of the individual wills, then everything depends on its being organic in

<sup>21</sup> Cf. August Müller, *Sozialisierung oder Sozialismus*, 1919, pp. 115-117. In *Die Neue Zeit*, 39 Jhrg., 1921, p. 121, Müller contended that "there can be no doubt that the German parliaments are incurring increasingly the indifference and dislike, not to say contempt, even of such circles of the German people as cannot be counted among the reactionary elements." Müller himself proposed an economic parliament dealing with economic affairs and subordinated to the political parliament.

<sup>22</sup> *Kritik der dreifachen Revolution*, 1919, p. 56.

<sup>23</sup> Schiller, *Demetrius*, I, 1 (tr. by Sir Theodore Martin).

origin, and not unnatural and artificial. The modern parliament is such an artificial will-construction."<sup>24</sup> Parliamentary democracy tears the individual from his proper setting, ignores the real unities of society, and attempts to make of political power something dissociated from all the other forces at work in the community.

The State, it was held, should be the association of all associations, standing above each individual and group, and equipped with highest power by virtue of its inclusiveness. By means of the council system the State was to be at once greater than ever before and infinitely less. It was no longer to be defined as a relation between rulers and ruled: the two elements were to merge into each other indistinguishably.

The council idea, one of its later supporters wrote, "does not mean a new form of management, but a grasping of the whole people in its professional work and the building up of a popular political representation, indeed the government of the people and the State's administration, on the basis of the professional organization of the people. The people gives itself its constitution from its workshops: State administration and self-administration become one."<sup>25</sup> The State built on the council system was to be more than State since it was the formal organization of all the interests and associations of the community, and less than State since its sovereign power was not that of organs lifted high above the people but of the whole people itself as organized for its everyday affairs.

The third argument advanced by the moderates in support of the council system is closely related to that which has been discussed immediately above. The feeling was very widespread that popular sovereignty had little or no meaning when it consisted only in the right to drop one's ballot in the ballot box at intervals of some years. Germany was, not

<sup>24</sup> Felix Weltsch, *Organische Demokratie*, Leipzig, 1918, p. 7. Othmar Spann, among others, was also writing in the same vein.

<sup>25</sup> Edgar Tatarin-Tarnheyden, *Die Berufsstände*, 1922, p. 236. It might be added that Georg Jellinek as far back as 1906 regarded the parliamentary system as<sup>9</sup> on the decline and advocated the inclusion in the formal political organization of the State of the groups and interests then excluded from it. Cf. his *Verfassungsänderung und Verfassungswandlung*, pp. 63 ff.

unnaturally, distrustful of any form of political organization which allowed the real power to pass without effective means of popular control into the hands of either government or administration or both. The council system did in fact bring the man in the street into intimate touch with the political affairs of the day. It made sovereignty seem a palpable thing, and not a formal abstraction for somebody else's power. Merely by giving an intelligent interest to the average man the council system set up a most effective check upon the actions of the men entrusted with political leadership; and there were many who hoped that the councils might prove to be the schools in which the German citizen could win the political experience so vitally necessary to the new democracy.

"Out of the turbulent whirlpool of the world war," writes a keen German observer, "emerges the Leviathan, the man-devouring State, mightier and more hideous than ever a pen has pictured it."<sup>26</sup> In Germany more than anywhere else this State had claimed omnipotence, had manifested authority over every sphere of life, and had absorbed the whole individual into its service. After the Revolution there was no inclination again to loose the Leviathan: he must be kept in hand, and the council system appeared to offer the means whereby this might be accomplished. It was not necessary to hold with the left wing that the parliamentary State was the chosen instrument for capitalistic oppression and exploitation of the proletariat; Germany had had a long enough experience of the Reichstag to know that not all parliamentary talk is political action or political wisdom. Both the theory and the practice of parliamentary democracy appeared in German eyes to justify the view that it did not offer adequate safeguard either for the sovereignty of the people or against the crushing sovereignty of the Leviathan. Further, the virtues of Western democracy had been little enhanced for Germany by the War and considerably less by the peace. It was not a formal democracy that Germany wanted, but a democracy which put the reins of power

<sup>26</sup> M. J. Bonn, *Die Auflösung des modernen Staates*, 1921, p. 18. Cf. Preuss, *Das deutsche Volk und die Politik*, p. 48.



into each man's hands and was based on the real organic structure of the community.

The Revolution itself gave ample evidence that the mere formula of the sovereignty of the people was not sufficient to ensure that the will of the people would actually rule. In fact it soon became apparent that the power of those who actually administered the affairs of State was scarcely to be exaggerated. Broadly speaking, the old administrative machinery remained intact during the Revolution. The practical futility of formal sovereignty was all too clear: highest political power was in the hands of the revolutionaries, but the wheels of State continued to turn surprisingly in the same fashion that they had before. The inherited machinery under a new master still seemed to act in the spirit of the old.

The Spartakists saw clearly enough the change that must come if the Revolution was to justify itself. "In the carrying out of a Socialistic revolutionary programme you must go the full length," it told its supporters. "It is not finished with the abdication of a couple of Hohenzollerns. And much less is it finished when a couple more government Socialists stand at the head of things. . . . Not refilling of posts from the top down, but reorganization of power from the bottom up. Take care that the power which you have won does not now slip out of your hands, and that you use it for your own ends." This proclamation appeared as early as the tenth of November, 1918; two days later the Independents followed suit: "In the same hour in which the walls of the old administration are shattered, the ground is cleared for the mighty structure of the new Socialist order."<sup>27</sup>

<sup>27</sup> Both these documents are reprinted in the appendix to Richard Müller's *Vom Kaiserreich zur Republik*, II, 250, 248. Even after the new Constitution had been put in force Max Cohen contended that the Republican forms were mere outward show. "Inside," he continued, "the wheels rattle along to the old tune. On the whole little more has happened than that the monarchical heads have been eliminated. Otherwise the old apparatus is very little changed, either in substance or in spirit. For that which to some extent functions is the old administrative mechanism, and that is anything but a guarantee for democracy"; "Die erste Verfassung der deutschen Republik" in *Sozialistische Monatshefte*, 53 Bd., 1919, p. 774. See also August Müller in *Schmollers Jahrbuch*, 42 Jhrg., 1918, pp. 171-185; Max Weber, *Gesammelte Politische Schriften*, 1921, pp. 139 ff.; Wilhelm Koenen,

G. P. Gooch remarks that "the councils formed a bridge between the officials, who retained their posts, and the people, who had won sovereign power"; and he cites Count Kessler as testifying that the Councils appealed to the German people because the latter "did not wish to cast off responsibility by delegating it through a term of years to parliamentary representatives: they wished to keep it tight pressed against their hearts."<sup>28</sup>

### THE NATIONAL ASSEMBLY

In the National Assembly the council idea did not fare as well as it did both before and after in the hands of many of the publicists. By the time that the National Assembly met at Weimar the council system had become almost wholly identified for the moment with the most radical elements of the Revolution, and the majority parties—the Social Democrats, the Center, and the Democrats, who between them vastly outnumbered all others—were in no mood to accept the suggestions of their bitterest opponents. At one time the provisional Social Democratic Government even announced that the councils would find no place in the Constitution whatsoever, but the "direct action" tactics of the workers forced a reconsideration of this decision.

All the views mentioned above found some slight measure of advocacy in the debates of the Assembly, but other matters than the council system held the center of the stage. The only version of the council system which was able to win effective support was that which proposed the building of an economic or social constitution in addition to the political one. The ultimate economic council was to be wholly subordinated to the political parliament, and was to have only initiatory and advisory powers. "Next to the political constitution there shall arise a social constitution, in which the social forces shall themselves be immediately effective," it was said. Social and industrial forces were held to need a systematic

Independent, *Nationalversammlung*, p. 1782; Bornhak, *Grundriss des Verwaltungsrechts*, 6th ed., 1920, p. 23.

<sup>28</sup> G. P. Gooch, *Germany*, 1925, pp. 175-176. Cf. Kurt Eisner, *Die neue Zeit*, 1919, pp. 88 ff. Edgar Tatarin-Tarnheyden, *Die Berufsstände*, 1922, 8.

organization: "we can no longer treat ourselves to the luxury of an unbridled private industry."<sup>29</sup> The prevalence of this view, aided by the pressure of the strikers, was the source of the by no means wholly satisfactory Article 165 of the Constitution.

One of the most significant speeches dealing with the council system, and in fact one of the best speeches of the whole Assembly, was that delivered before the Constitutional Committee by the distinguished Democrat, Friedrich Naumann.<sup>30</sup> Naumann's plan was to make the Bill of Rights the most important feature of the Constitution, since it was to contain a general statement of all the social, political, and economic aims of Germany and the Germans, lay down the norms of future development, and serve as a sort of national repository for all good German ideas and beliefs. To accomplish this program Naumann found it necessary to take stock of the underlying principles of the Revolution.

In 1848, he saw, the Rights of Man were negative, "the inalienable rights of the ego as against the power of the encircling State." "The politics of that time were the politics of the *Rechtsstaat*, where one had not yet grasped the

<sup>29</sup> Hugo Sinzheimer, Social Democrat, *Ausschuss*, p. 393. Equality between the political parliament and the economic parliament might, he feared, be "a barrier to the full operation of the democratic principle." See also Sinzheimer's speech in the Assembly on July 21. His views are representative of those held throughout by the Social Democrats. They were attacked from both sides: the parties of the right, with von Delbrück as their chief spokesman, wanted a return to a modified form of the old *Berufsstände*, while the left wing, notably Cohn, Haase, and Koenen, seized every opportunity of demanding the fullest possible inclusion of the councils as a means, if not to dictatorship, at least to Socialism.

<sup>30</sup> Cf. *Ausschuss*, March 31, pp. 176 ff. The Bill of Rights and Duties proposed by Naumann contained a number of provisions which could hardly justify their inclusion in a constitution at all, and others which obviously belonged in the body of the constitution itself.

The final "Grundrechte und Grundpflichten der Deutschen" are a very heterogeneous assemblage, expressing a variety of different political and social philosophies. Brunet, *op. cit.*, p. 202, is, however, justified in his conclusion that in this Bill of Rights as opposed to that of earlier constitutions, "individual liberties are no longer an end in themselves, nor do they constitute any longer an independent good. They are limited and conditioned by the duty of the individual to cooperate in the well-being and the development of the collectivity." It is far more difficult to agree with the comment of Charles A. Beard in the preface to Brunet's work, p. vii, that the 1919 Constitution "vibrates with the tramp of the proletariat."

connection of the State with economic groupings, or at least not deeply." Now a new constitution was necessary in the first place because "the monarchy is no longer existent" and secondly because of the entrance of the fourth estate, of the socialist worker, into political affairs. "The group individual," he continued, "is the normal individual of the present, the socialized grouped individual seeks constitutional expression." A modern constitution must be a compromise between the individualism of yesterday and the Socialism of today.

"The political question means for us today: either we will be drawn into the Russian soviet-council conception or we will be linked to the West-European-American form." The Russian Constitution he held to be the opposite of the *Rechtsstaat*. He held it to be built on the principle of the extermination of the exploitation of man by man: "The power of the State belongs to the working population. . . . The construction of sovereignty thus follows according to an absolutely different principle." Unless the new constitution takes a definite stand on these great modern questions, he argued, all the other fundamental rights become little more than a museum piece. Naumann's own proposals steered a middle course between the *Rechtsstaat* and the *Rätestaat*. He sought official recognition by the State of all industrial associations, gathered these together into an industrial constitution, and gave them autonomy in their own field.

Hugo Preuss, also a Democrat and chief of the Fathers of the Constitution, was far less generous to the councils than Naumann. For him democracy and parliamentary government were the forms of political organization which are "the indispensable presupposition for any social development in the way of freedom and of the *Rechtsstaat*." The councils meant to him only a proletarian dictatorship which might strive in vain to reach these goals. "And even one breach of the organization of parliamentary democracy," Preuss contended, "through the insertion of a functional (*berufsständischen*) organ would not promote that development but would hinder it, because it would weaken and ultimately

destroy its political presupposition—parliamentary democracy—through the inner struggles of the heterogeneous organs.”<sup>81</sup>

In conclusion it may be said briefly that the political rôle assigned to the councils by Article 165 is slight and that there has so far been little practical tendency to enlarge it. The Economic Council of the Reich has neither in theory nor in practice rivaled the Reichstag or threatened its supremacy. “The basic idea of this council system,” to quote the best of the commentators on the Constitution, “is the organization in public law and under the guidance of the State of the social forces—hitherto free—of economic life, the creation of a special economic constitution beside the political constitution with its own functions for the purpose of achieving the solution of the problems of economic organization through the coöperation (*Hervanziehung*) of the economic forces themselves. . . . Article 165 contains the outlines of a new economic constitution and to a certain extent lays down the fundamental rights of the members of the community in their capacities as employers and employees.”<sup>82</sup>

### “THE MOST DEMOCRATIC DEMOCRACY OF THE WORLD”

On the final acceptance of the Constitution by the National Assembly the Minister of the Interior David remarked: “Not only political but economic democracy as well is anchored in it. . . . Nowhere in the world is democracy more consistently achieved than in the new German Constitution. . . . The German Republic is henceforth the most democratic democracy of the world”; and the President of the Assembly added: “Thus we now lay the Constitution

<sup>81</sup> *Deutschlands Republikanische Reichsverfassung*, 2d ed., 1924, pp. 86-87.

<sup>82</sup> F. Giese, *Verfassung des Deutschen Reiches*, 7th ed., 1926, pp. 416-417. There is a general insistence (*cf.* especially Berthelot, *Works Councils in Germany*, pp. 1 ff.) that the present councils are to be regarded rather as developments from the War and pre-war associations than from any revolutionary aping of Russia. See also, Herman Finer, *Representative Government and a Parliament of Industry*, 1923.

into the hands of the German people, whom we have made thereby the freest people on earth."<sup>33</sup>

From one standpoint there could be no doubt of the sovereignty of the people. The Constitution itself in its first article proclaimed not only that "the German Reich is a republic," but as well that "the political power emanates from the people";<sup>34</sup> and there was a general tendency even among the critical to accept this statement of fact as indicating that sovereignty must be lodged at the source from which political power is derived. In other words, it was natural to conclude that the people were sovereign and the exercise of their sovereignty was entrusted for the most part to the Reichstag; but this view was not allowed to go unchallenged.

It was undeniable that popular sovereignty expressed itself in the elections to the presidency and to the Reichstag and further in the several provisions for popular votes and referendums. "Nevertheless" insisted one critic, "the highest power does not really rest with the people, since the Constitution can be changed and all the constitutional rights of the people set aside without the people being able to protect itself. The so-called obligatory constitutional referendum is lacking. And even inside the Constitution the ordering of a referendum against an enactment of the Reichstag has been made exceptionally difficult politically in most cases, because the order for a referendum must be countersigned; but the chancellor and the ministers of the Reich require the confidence of the Reichstag."<sup>35</sup>

<sup>33</sup> Cf. *Nationalversammlung*, pp. 2194 ff. "Democracy," comments Heinrich Oppenheimer, *The Constitution of the German Republic*, 1923, p. 127, "in the German Constitution, is not only the ruling political principle; its spirit also permeates the whole of the social, and in particular of the economic, fabric." Cf. Fritz Stier-Somlo, *Die Verfassung des deutschen Reiches*, 1919, pp. 82 ff.

<sup>34</sup> "Die Staatsgewalt geht vom Volke aus." Cf. Oppenheimer, *op. cit.*, p. 11. The translation given above is that of Rogers and MacBain, *The New Constitutions of Europe*, 1922, p. 176. Oppenheimer, p. 219, translates "die Staatsgewalt" as "supreme power." Either rendering is possible; in fact, it would be possible, but dangerous, to render "Staatsgewalt" directly as "sovereignty," as is occasionally done.

<sup>35</sup> W. Jellinek, "Revolution und Reichsverfassung," *op. cit.*, p. 85. A return to the dogma of *Kompetenz-Kompetenz*.

The problem of the "sovereignty" of the several organs of the Reich was, of course, one to which the National Assembly devoted much of its time. Considerable influence in this respect was exerted by the work of Robert Redslob, who insisted that, in order to safeguard the freedom and the sovereignty of the people, it was necessary to set up some degree of a balance of power between the head of the State and the parliament. As the classic example of a "genuine" parliamentarism Redslob took England, while France served him as an example of what should not be done. Of France he wrote, "the sovereignty of the people, which is latent and only manifests itself every four years, is in between times replaced by a quasi-sovereignty of the parliament, which appears as the true representative of the people since it, through the way in which it is elected, is closer to the people than the bearer of the executive power."<sup>36</sup> Since the French executive is dependent upon the will of the parliament, Redslob declared that France had no parliamentary system but "only a reminiscence" of it—"its soul is dead." In England on the contrary since the head of the State derives his power from an independent source he is able to face parliament on equal terms; the same holds true of the president of the United States, although here of course other features of the parliamentary system are lacking. Only a dual system of independent powers, Redslob held, "is in a position to clothe the people with sovereignty, because it lifts the people to the position of judge over powers of equal strength which neutralize each other in case of conflict, and gives the people opportunity to support the power which represents its true will. Where on the other hand there is only one or at least one predominant power then the people find no rival on which they can fall back and are unable to enforce the popular will."<sup>37</sup>

This view of the parliamentary system, whether derived directly from Redslob or not, was held by a number of members of the National Assembly, but they were unable to

<sup>36</sup> *Die parlamentarische Regierung in ihrer wahren und in ihrer unechten Form*, 1918, p. 174. Cf. Julius Hatschek, *Deutsches und preussisches Staatsrecht*, 1922, I, 46-47; *Ausschuss*, April 4.

<sup>37</sup> *Die parlamentarische Regierung*, pp. 180-181.

secure the acceptance of the substance of their proposal, although they did succeed in winning a certain formal recognition of it. Under the Weimar Constitution the president is popularly elected and is equipped with numerous opportunities to appeal to the people against the Reichstag, but these appeals are always subject to the countersignature of the chancellor or ministers. The president cannot, however, be said to rival the power of the Reichstag in himself since, broadly speaking, his only power is that of submitting matters to the people for decision.<sup>38</sup> That the powers of the president are not adequate to the duties which he should perform is argued by Joseph Lukas, a warm supporter of Redslob.<sup>39</sup> The solution proposed by Lukas is that the executive should be, from the formal legal standpoint, wholly the affair of the president, even though politically the executive power came from the parliament.

Hugo Preuss himself, always dubious of any strict concept of sovereignty, argues that although the new Constitution puts the Reichstag at the center of the life of the State, this in no way signifies unlimited autocratic sovereignty of Parliament. On the contrary, the principle of the constitutional State, established on the basis of law, requires the co-existence of several supreme organs of the State between which parliamentary government forms the elastic link; and it requires the control of independent courts which can de-

<sup>38</sup> Both the German critical faculty and the anti-democratic leanings of many of the thinkers led to an elaborate analysis of what exactly was meant by "the people." This was not always carried on in a spirit of hostility, but it served nonetheless to dispel the democratic illusions that "the will" of "the people" found sure expression through parliamentary institutions and that the parliamentary majority was by its nature entitled to solemn reverence. One of the best known of the works in this field (and in this case a hostile one) is Wilhelm Hasbach's *Die moderne Demokratie*, 1912, but there are many others worthy of study. Hans Kelsen's *Vom Wesen und Wert der Demokratie*, 1920, gives in brief compass the critical and reasoned acceptance of democracy by some later German thinkers.

<sup>39</sup> Cf. his *Die organisatorischen Grundgedanken der neuen Reichsverfassung*, 1920, Sec. 3, Oppenheimer, *op. cit.*, chap. V, takes the same view. He comments that the makers of the Constitution "attempted to blend the presidential with the parliamentary type of republican government. . . . This novel experiment has proved, as might have been anticipated, an utter failure, and the executive is in practice purely parliamentary," p. 12.



termine the legality of all private and public acts.<sup>40</sup> A very similar view was taken by Otto Meissner, who saw the Reichstag as the predominant and most important organ of popular sovereignty and as chief bearer of the power of the Reich, but recognized the president as also a bearer of that power through his popular election and his independence of the Reichstag.<sup>41</sup>

Before passing to federalism there remains one question which it is by no means simple to answer. Did the German idea of the State undergo a change as a result of the Revolution and the new Constitution? Did the *Obrigkeitsstaat* maintain its predominancy, or did popular sovereignty bring with it the idea of the *Volksstaat* for which Preuss had pleaded? Evidence in quantities can be produced to support either view, but in general there is little doubt that the State has come to be regarded rather as the political organization of the people for the management of their own affairs, than as a political organization imposed on the people for the carrying out of the will of an authoritarian government. With the passing of monarchy the symbol of the State as sovereign Person standing high above the people was removed. The philosophic jurists had on the whole ignored the conception of the State as power exercised from above and embodied in the head of the State. The Revolution had thrown power into the hands of the people, and the Constitution had been framed by the directly elected representatives of the people. In addition, all, as in the title-page of Hobbes, had formed part of the body of the Leviathan throughout the cruel years of the War. The post-war and post-Revolution State in Germany was a State founded on the sacrifices of every German citizen and rebuilt through the labor of the people.

<sup>40</sup> "The Republican Constitution" in article "Germany," *Encyclopedia Britannica*, 1922, XXXI, 250.

<sup>41</sup> Otto Meissner in the *Handbuch der Politik*, 3d ed., 1921, III, 41. In his *Das neue Staatsrecht des Reiches und seiner Länder*, 1921, p. 49, he states that the "highest organ and supreme bearer of political power in the Reich is the Reichstag; as the representative of the united German people from whom sovereignty emanates, the Reichstag embodies the sovereignty of the Reich."

That the older view still survived may be seen in many quarters; a single reference will be given here. Conrad Bornhak in the post-Revolutionary edition of his work on public law defines sovereignty as "the property, essential to the State and peculiar to it alone, of being highest power. This property expresses itself in international law as against other States, in inner-State law as against its own subjects." "The State is highest rulership over territory and people. Therein the nature (*Wesen*) of the State is exhausted." "Externally the State is political power and manifests itself among the powers of the earth as such. States like Belgium or indeed the State of Luxemburg were parodies and owed their continued existence only to the rivalry of the Great Powers. As political power the State is an end in itself."<sup>42</sup>

As a contrast to this it is interesting to note the comments of Gerhard Anschütz, a publicist and jurist who had not feared to express his sympathies with the democratic liberalism of Preuss in the very middle of the War. "The State," he insisted, "is no institution standing beyond us, but we ourselves, the association of the whole people, are the State. . . . The State is not a power standing in a transcendental relation to us, but in an immanent relation. It is a power to which we are all subjected, and at the same time one in which we all share. The bringing together of all the forces of the people in the State, the coöperation of all in the State, conscious of their duty, the responsibility of all for the State, therein lies the nature and value, therein the ethos of democracy."<sup>43</sup>

## II. THE NEW FEDERALISM

With the Revolution the old problem of German unity again became acute. Hugo Preuss had contended that the disunity of Germany was essentially conditioned by the

<sup>42</sup> *Grundriss des deutschen Staatsrechts*, 5th ed., 1920, pp. 6-12.

<sup>43</sup> *Drei Leitgedanken der Weimarer Reichsverfassung*, 1923, pp. 30-31. Cf. also his review of Preuss's *Das deutsche Volk und die Politik* in the *Preussische Jahrbücher*, 164 Bd., 1916, pp. 339-346; and his *Parlament und Regierung im deutschen Reiche*, 1918.

existence of a multitude of independent princes, and that once the latter had been displaced the true unity of the German people, one and indivisible, would be asserted. He argued that Bismarck's Reich had merely veiled the antagonism between nationality and State in Germany: under the forms of federalism it had concealed the hegemony of monarchical Prussia over the other States. The degree and kind of unity that Bismarck had achieved Preuss saw as neither far-reaching enough nor as representative of the real national unity of the German people. Eliminate the princes, he said, and the people will speak as one nation. The Revolution demonstrated clearly the extent to which he had underestimated the undying strength of German particularism. Kaiser and princes vanished overnight, but the particularist boundaries did not vanish with them. The unit in terms of which many thought and acted tended to be rather the local republic than the German Reich.

On the other hand it is true that the revolutionary Government can in no way be considered as having exercised powers delegated to it by the States. Its existence was quite independent of the States and it went about its business of reconstructing Germany without according any considerable formal rôle to them. On a number of different questions the States were in fact consulted by the central Government and the first days of the National Assembly saw the establishment of an advisory Committee of the States, but the National Assembly itself was called without reference to the States and definitively accepted the new Constitution without submitting it to them. Although the great and unexpected influence that the States were able to exert is visible at every stage in the negotiations leading up to the adoption of the Constitution, the latter must be regarded both historically and legally as the work of the sovereign German people, and not of the several States. The Reich which Bismarck forged was a federal union of hitherto sovereign States; the new Reich was the political organization of a single people, subsidiarily divided into largely autonomous political units to which the name State might or might not be given.

Preuss himself was an ardent protagonist of the greatest

possible unity that could be achieved. He held the several German States to be anachronistic and artificial agglomerations of essentially diverse elements, which could only hinder Germany's natural development. At heart his plan was to ignore the States, to see Germany as a whole, and to rearrange its territorial subdivisions in terms at once of administrative efficiency and of economic and social reality. Prussia especially, he held, was destined to give up its independent existence and merge itself indistinguishably into a unitary Germany. From every side there sprang up objections to his scheme as embodied in the draft constitution which the provisional Government had adopted as its own. Nearly all did lip-service to the principle of German unity, but the influence of the States was too great to allow the adoption of the Preuss plan without considerable modification.<sup>44</sup>

Elaborate discussion of the exact juristic nature of the present Reich is, as Preuss insisted from the outset, a fruitless occupation. It is best to say with Bredt that "one will scarcely be able to find an unobjectionable theoretical solution, and even if one were able to, it would have little practical significance."<sup>45</sup> To this of course the good jurist may reply that such a view "overlooks entirely the popular psychological effect of the decision as to whether State or not State, federal State or unitary State";<sup>46</sup> but, as the writer of this objection himself amply demonstrates, the decision rests rather on one's preconceived notions than on any strict juristic reasoning. In the old Reich the majority of writers had conceded sovereignty and Statehood to the center; even here the Statehood of the members had been saved only by the conclusion that political communities resembling States, but not sovereign, might still be termed State. In the new Reich there could be no question of the character of the

<sup>44</sup> For the changes that were gradually worked in the Preuss draft, see G. J. Ebers, *Die Verfassung des deutschen Reiches vom 11 August 1919*, 1919, in which the various forms of the Constitution are given in parallel columns. It also contains "Das Reichsgesetz über die vorläufige Reichsgewalt" of February 10, 1919.

<sup>45</sup> J. V. Bredt, *Der Geist der deutschen Reichsverfassung*, 1924, p. 118.

<sup>46</sup> Cf. Max Wenzel, *Juristische Grundprobleme*, 1920, p. 326.

Reich as a sovereign State, but the members had lost many of the features which had contributed to their *Staatlichkeit* before. Even the name of State was lost to them and they figured in the Constitution for the most part as *Länder*, although this change in nomenclature was not held to prejudice their juristic nature.<sup>47</sup>

Through the Revolution the Reichstag and the Reichsrat—the old Bundesrat—may be said to have changed places. No longer did the representatives of the “sovereign princes” and the free cities hold the sovereign power of the Reich. It was not the monarchic-federal element which was supreme in the new Reich but the democratic-unitary: the Reichstag became the bearer of supreme power, and the Reichsrat, representing the States, was pushed to one side. Furthermore, despite all opposition, the Preuss proposal which made it possible for the territorial boundaries of the States to be changed without their consent took its place as Article 18 of the Weimar instrument. According to the previous article, “every State must have a republican (*freistaatliche*) constitution”; and further regulations are here laid down as to the scope of the suffrage, the mode of voting, and the organization of the government. Very far-reaching powers of legislation and administration are given to the Reich, even to the extent of a general clause (Art. 9) stating that “in so far as there is need for uniform regulation, the Reich shall have the power of legislation in respect to (1) public

<sup>47</sup> Preuss originally used the word “*Freistaat*” as well as “*Land*.” Throughout the debates in the Assembly and the Constitutional Committee the three terms “*Land*,” “*Staat*,” and “*Freistaat*” were used as virtually equivalent to each other. The choice between them appears to have been dictated less by juristic than by stylistic and emotional considerations. There is little question, however, that the term “*Land*” was deliberately used instead of “*Staat*,” apparently to signify the changed status of the member units under the new Constitution. Cf. MacBain and Rogers, *New Constitutions of Europe*, 1922, p. 176, note 2. In several instances in the Constitution the *Länder* are called States. The usual English translation appears to be “State,” but see George Young, *The New Germany*, 1920, p. 321, note. Oppenheimer, *The Constitution of the German Republic*, p. 35, says: “The German Constitution has taken special care to evade the issue by choosing a purely geographical, and politically neutral, term”; but this view can scarcely be justified if one consider the ancient traditions of the term and its use by so strong an advocate of States’ rights as Max von Seydel.

welfare, (2) the protection of public order and security." As under the old Constitution, constitutional amendments require only the legislative action of the Reich, although with a heightened majority, and in addition may be secured through a referendum by a simple majority of those entitled to vote.

It will be clear from the above that no great measure of Statehood can be said to inhere in the present *Länder*, and that if they are to be called States it will be rather on historical and political grounds than because of their juristic attributes in constitutional law. Politically and historically they unquestionably deserve the title: the strength of their present position is considerably greater than is indicated by the Constitution. Apart, however, from the question as to the popular effect of nomenclature there is no reason to regard the juristic problem as an important one. The spheres of competence of the Reich and its member-units and the relation between the two are on the whole adequately defined by the Constitution, and where they are not, no amount of denial or affirmation of Statehood can help to bring greater clarity. The difficulty lies not in the lack of precise information about the distribution of powers, but in the absence of clearly defined and accepted concepts.

Not without a certain degree of success, Preuss struggled to free German jurisprudence from the problem which had encumbered it from the first days of Bismarck's Reich. There was, as has been said above, a movement toward a freer jurisprudence and away from the *Spitzfindigkeit* of the former *Begriffsjurisprudenz*, to drop into German terminology. The Revolution stimulated this movement by calling attention to the great social forces which the political thought of German jurisprudence tended to ignore and by opening new and more fruitful fields of speculation, such, for example, as the council system. A distinguished writer on the Constitution has remarked that whatever else one may think of that instrument one must admit that "it presents a grateful object for new juristic contemplation and value-judgments, which allows us to expect that an invigorating breeze will blow through the science of valid living public

law; and which should be all the more welcome since our old researches on the long-since exhausted basis of the public law of the Reich could scarcely let us hope for any further results."<sup>48</sup> No sphere of the old public law was more thoroughly exhausted, or less satisfactorily, than that dealing with federalism.

Whether the Reich should be considered a federation with a strong national central authority or a unified State with far-reaching territorial decentralization, Preuss dismissed as "hardly more than a theoretical controversy about terminology." While in the old days it was necessary to call the member-units States "since monarchs at the head of self-administered bodies fit in badly with the monarchical outlook," as he put it, now that situation no longer existed. According to Preuss, whether one chose to see in the new Reich "the realization of the decentralized 'unitary State' or the true 'federal State' is obviously a purely academic question."<sup>49</sup> He rightly denied that there could be any satisfactory juristic criterion between the State within a federal union and the autonomous self-administering community. Certainly that criterion could not be sovereignty, since "if the word 'sovereignty' is to have any meaning whatsoever, then it means that there can be no legal power above the sovereign State. Hence a member-State can never be sovereign."<sup>50</sup>

Preuss deliberately attempted to turn the discussion away from the narrowly juristic, and insisted instead that the unitary nature of the Reich must be stressed on political grounds. "That the unity of the people and of the Reich is primary and the division into *Länder* secondary," Preuss said over and over again in one form or another, "not only stands at the head of the Constitution of Weimar, but runs throughout its whole content as guiding principle."<sup>51</sup> The

<sup>48</sup> Leo Wittmayer in the *Archiv für öffentliches Recht*, 39 Bd., 1920, p. 885. Wittmayer's *Die Weimarer Reichsverfassung*, 1922, is among the best of the works on the Constitution.

<sup>49</sup> Cf. *Deutschlands republikanische Reichsverfassung*, 2d ed., 1924, chap. IV; *Encyclopædia Britannica*, XXXI, 251.

<sup>50</sup> *Ausschuss*, p. 80.

<sup>51</sup> *Deutschlands republikanische Reichsverfassung*, p. 48.

foundation of the new Germany he saw as the unitary national State, a true approach to which was first achieved by the 1919 constitution. In no respect, he argued, was the German Republic a union of single States: "The *Länder* are subdivisions of the unitary German State and people (*Staatsvolkes*), and are subject to remodeling according to the life-interests of the nation-State."<sup>52</sup>

On the whole the National Assembly, like Preuss, was content to leave the juristic fine points of federalism to the brain-racking struggles of the jurists, as one of its members said. There was general agreement that even though the attainment of the unitary German State was the ultimate ideal, political reality had made that step impossible at the present time, and that the Reich had remained a *Bundesstaat*. Further it was obvious, as Konrad Haussmann remarked in introducing the Constitution to the Assembly for the second reading, that a decisive step had been made toward the unitary State and that it was generally realized that "the whole economic and political center of gravity lay in the Reich and not in the individual States."<sup>53</sup> "If this Constitution is accepted," continued Haussmann, "then one can say that no people on earth has a freer constitution. The solution corresponds to the spirit of the people. The German Reich is a unified (*einheitlicher*), popular, and free State, based on the free self-determination of the whole nation. The Reichstag is the bearer of the sovereignty, which rests with the German people."<sup>54</sup>

<sup>52</sup> *Der deutsche Nationalstaat*, 1924, p. 137. This latter principle—the right of the center to reconstruct the parts—was peculiarly dear to Preuss's heart. See his *Artikel 18 der Reichsverfassung*, 1922. It will be remembered that at one time Preuss held the view that territorial inviolability was the essential criterion of Statehood, but he later abandoned this position.

<sup>53</sup> *Nationalversammlung*, 2 July, 1919, p. 1203. The speech of Kahl, pp. 1204D ff. is of considerable importance, as well as the whole succeeding debate.

<sup>54</sup> *Op. cit.*, p. 1204B. Haussmann held that the greatest difference from the standpoint of organization between the old Reich and the new was that the *Bundesrat* was no longer the political center.



FEDERAL AND UNITARY *STAATSGEWALT*

This problem, hinted at by Haussmann, as to where sovereignty did in fact rest, or rather how its mode and place of resting should be described, caused a surprising amount of controversy. Preuss's original draft had it that "all political power lies with the German people" (*Alle Staatsgewalt liegt beim deutschen Volke*). This version was changed first to "the political power lies with the people," and ultimately to "the political power emanates from the people." Another proposed version which was never embodied in the Constitution but which gives a clue to the difficulty was that of Konrad Beyerle (Center): "The political power in the Reich and in the member-States lies with the people."<sup>55</sup> The problem was to make apparent what Preuss no doubt would have been glad to leave obscure, that the power of the member-State was not derived from the Reich, but independently from the citizens of that State. Of the version submitted by Preuss there could only be the interpretation that since *all* political power lay with the *German* people the power of the particular States must be regarded as derived from the people as a whole through their organ, the Reich. Beyerle's proposal also left the matter in no doubt: both Reich and member-States were original subjects of the power exercised by them. The finally accepted version appears to fall in somewhere between that of Preuss and that of Beyerle. There was general agreement in the Constitutional Committee that the States should not be regarded as sovereign, but that their power should be their own, *i.e.*, not delegated by the Reich.

The comment of Giese on this clause of the Constitution may be taken as representative: "The German Reich is a *Volksstaat*, because the active population of the Reich, *i.e.*, the whole of the electorate of the Reich, is the source of German political power, constitutes the so-called bearer of the political power. The population of the Reich in this connec-

<sup>55</sup> *Ausschuss*, March 6, p. 30. It was pointed out by Koch on the same day that this clause was only intended to express the transition from the *Obrigkeitsstaat* to the *Volksstaat*, and that the conflict over the sovereignty of the Reich and its member-States must be settled on the basis of the powers constitutionally allotted to each.

tion is not taken federally as the sum of the State populations, but unitarily as an undivided unity. The basic principle of popular sovereignty appears at all points in the content of the Constitution, and for political reasons, in order to exclude dictatorship by the Councils, it is also expressly laid down in the Constitution, and is thus assailable in public law only by means of a constitutional amendment. The legal prescription extends further since it consciously speaks not of the "German people" but simply of the "people." It thus extends itself to the constitutional form of all German *Länder* and establishes for these as well the principle of the *Volksstaat*. . . . The legal prescription in no way, however, means that the political power of the *Länder* (which, properly taken, emanates from the people of the *Länder*) rests with the whole German people, *i.e.*, the population of the Reich, and is a political power derived from the Reich. Such a construction could have found support in §21 of the Preuss draft, but is excluded by the wording of the accepted text."<sup>56</sup>

This question of the originality and independence of the power of the States naturally played a leading rôle in the juristic evaluation of the new federalism. In the old Reich the *Ursprünglichkeit* of the States' powers had come to be regarded as virtually the keystone of their Statehood, just as the sovereignty of the Reich was established through its possession of *Kompetenz-Kompetenz*.

One of the few loopholes left by the Weimar Constitution to those who wanted to assert the Statehood of the *Länder* was that of the article which has just been discussed. It was, however, a generally accepted qualification of the theory of originality of power that a State must be free (as the States formally were in the old Reich) to organize its power as it

<sup>56</sup> F. Giese, *Verfassung des deutschen Reiches*, 7th ed., 1926, pp. 49-50. Cf. Eduard Hubrich, *Das demokratische Verfassungsrecht des deutschen Reiches*, 1921, pp. 19-20. "The will of the National Assembly was that the power of the Reich should appertain to the people in the Reich, the power of the individual States to the people in the *Länder*," Fritz Stier-Somlo, "Die rechtliche Natur und politische Eigenart des deutschen Reiches" in the *Handbuch der Politik*, 3d ed., 1921, III, 5. See also the latter's *Die Verfassung des deutschen Reiches*, 3d ed., 1925.

chose, that is, to determine its own constitutional form. The question inevitably arose, as it had arisen long before under the American Constitution, as to whether the several requirements imposed upon the State constitutions by Article 17 did not impair the quality of this originality of power. It was generally held that notwithstanding this article the States had a sufficient sphere of constitutive freedom.

No agreement was reached by the jurists in the first years after Weimar as to whether Germany was now a unitary or a federal State and as to whether the member-units were or were not to be regarded as States. Conrad Bornhak, accustomed to the federalism of the old Reich, asserted flatly that "according to the new Constitution of the Reich, the Reich has won the character of a unitary State. . . . Nothing less than everything is lacking to the *Länder* as States."<sup>57</sup> Eduard Hubrich as one of the spokesmen of the opposite view stated equally confidently that "there can be no doubt that the individual *Länder* even under the new Constitution are in reality non-sovereign States, and that the Reich on the other hand is a sovereign collective State (*Gesamtsstaatswesen*) constructed out of them," and Walter Jellinek said briefly: "the *Länder* are States and the Reich is a federal State."<sup>58</sup>

The argument of Bornhak is of special interest since he discards, as did many of the post-Revolutionary writers, the hard-won concepts of federalism of the previous generation. Seydel's theory he rejected on the grounds that its ultimate conclusion must be the complete subordination of the union to the member-States who might at any moment abandon or reshape it. The *Kompetenz-Kompetenz* view of Laband, Haenel, and many others he found unsatisfactory because it put sovereignty wholly into the hands of, in the old régime, the Reich and assumed the latter's will to be independent of the States. This was impossible, he argued, because Prussia in Bismarck's Constitution was able to block any constitutional amendment and blocs of States could do likewise.

<sup>57</sup> *Grundriss des deutschen Staatsrechts*, 5th ed., 1920, pp. 117-118.

<sup>58</sup> Hubrich, *op. cit.*, p. 17; Jellinek in the *Jahrbuch d. off. Rechts d. Gegenwart*, 1920, IX, 80.

"Where," he asked, "is then the *Kompetenz-Kompetenz* and the sovereignty?"

Sovereignty, he answered, much as Gierke had done nearly fifty years before, is a property of the State, derived from the theory of the unitary State. But in federalism power is divided between center and members; either alone is only a torso. "It is only the two united which fulfil the duties of the State completely and really build the State itself. And the same holds for sovereignty as well. The Reich could not extend its competence against the will of Prussia, Prussia could not extend hers against the will of the Reich. But what they could not do singly they could do together. Thus neither the Reich nor the single State had sovereignty for itself alone; but in fact both of them had it together."<sup>59</sup>

This division of political power made the old Reich a federal State for Bornhak, but he denied that there was any such division in the new Reich. The preamble declares that the unified German people gave themselves their new Constitution, and Bornhak saw "the political power" as emanating from the people. The political power of the Reich, Bornhak concluded, was one even though it expressed itself through a double organization; as stated by Art. 5 it is exercised by the Reich's organs in Reich affairs and by the organs of the *Länder* in their affairs. According to the usual theory of the non-sovereign State, Statehood depended on the existence of a sphere of uncontrollable and independent power; but Bornhak held that under the new constitution there remained no such sphere. "The competence of the Reich is so greatly extended," he wrote, "that the *Länder* now appear only as executive (*ausführenden*) organs of the Reich. And even the extent to which the competence of the *Länder* still reaches can always be limited or withdrawn by the Reich. In relation to the Reich, the *Länder* are now only provinces which admittedly are not mere administrative areas, but have a constitutional standing."<sup>60</sup>

<sup>59</sup> *Grundriss des deutschen Staatsrechts*, 1920, p. 116.

<sup>60</sup> *Op. cit.*, p. 118. In his *Grundriss des Verwaltungsrechts*, 6th ed., 1920, pp. 23 f., Bornhak discusses the loss of administrative independence by the States. Erwin Jacobi in his *Einheitsstaat oder Bundesstaat*, 1919, comes to much the same conclusion as Bornhak. The Reich, he contended, p. 17, had

In this radical view Bornhak found some support, but most writers chose again to modify the concept of the State and admit the German *Länder* to an unprecise and conditional Statehood, while the concept of the *Bundesstaat* was either widened to include the Reich or that of the *Staatenstaat* was substituted for it. An analysis on this basis was carried out by Fritz Poetzsch who insisted that it was only possible to call the *Länder* States because "the concept of the State is from the outset extraordinarily adaptable and elastic and in German usage does not need to embrace the full State omnipotence of Roman law. To attempt through its application to derive sovereign rights in the old sense for the member-States as opposed to the Reich is at all events no longer possible. That which will lift Prussia, Bavaria, Saxony, and other middle States above the level of self-administering bodies in the future will rest less on the basis of public law than on the fact of their historically founded State-like appearance, which will continue to live in the consciousness of coming generations."<sup>61</sup> From the juristic standpoint, however, Poetzsch denied the Statehood of the *Länder*, but, cautiously, would not commit himself in regard to the Reich further than to say that it "in its new form stands closer to the unitary State than to the federal State." That the Reich was not yet entirely a unitary State appeared to him evident in the fact that the Constitution explicitly enumerated its spheres of competence.

But it is obvious, merely to judge from the number of writers who held an opinion contrary to that of Poetzsch, that disagreement was wholly possible as to whether the *Länder* were or were not States, according to the accepted concepts of public law. Joseph Lukas, Adolf Arndt, Fritz Stier-Somlo, Otto Meissner, and Eduard Hubrich, for example, all asserted that the *Länder*, despite their admitted

become "a unitary State, decentralized by means of large self-administering bodies."

<sup>61</sup> *Handausgabe der Reichsverfassung*, 2d ed., 1921, p. 37. Giese, *op. cit.*, pp. 46-47, also held that the *Länder* could not be classified as States in the usually accepted sense of the term, but that they were nevertheless regarded as States by the special terminology of the new German constitutional law.

shortcomings, must still be placed in the category "State." In the main this view was based on the three points brought forward by Lukas, who insisted: 1. that the States were still able to determine their own constitutions to a sufficient degree and hence possessed original power of rulership, 2. that their measure of control over their territorial boundaries was far greater than that of the non-State community, and 3. that their legislative, executive, and judicial powers were much more far-reaching than those of the latter.<sup>62</sup> To this list others added the representation of the States in the Reichsrat, and pointed out that, according to Article 2 of the Constitution, "the territory of the Reich consists of the territory of the German *Länder*," as further arguments in favor of Statehood and of the federal character of the Reich. There was general agreement among these jurists to the statement of Meissner that the member-States still have, though in less degree than before, "a fullness of governmental competence and public power (*eine Fülle obrigkeitlicher Befugnisse und öffentlich-rechtlicher Macht*) in their own right and not through delegation by the Reich."<sup>63</sup>

One grave difficulty that had to be overcome by all writers who took the stand that the *Länder* were States was the fact that under the new Constitution the Reich had been given the power to wipe out its member-units by constitutional amendment without consulting them and to transform itself into a unitary State. As Arndt stated it, "the competence of the Reich has been so far extended that the States . . . are entirely at its disposal."<sup>64</sup> But the doctrine of *Kompetenz-Kompetenz* offered a comparatively easy means of escape from this dilemma: the power of the Reich to extend its com-

<sup>62</sup> *Die organisatorischen Grundgedanken der neuen Reichsverfassung*, 1920, pp. 19-20.

<sup>63</sup> *Das neue Staatsrecht des Reichs und seiner Länder*, 1921, p. 25.

<sup>64</sup> *Die Verfassung des deutschen Reiches*, 2d ed., 1921, p. 44. He continues, however (p. 48), to say that the Reich has remained a federal State and that "the *Länder* are still States—not mere self-administering bodies—because they have preserved a residue of territorial sovereignty. . . . But they can no longer pass as (limitedly) sovereign even in the sense of the former *Bundesstaat*. Their existence, disappearance, or alteration is in the last analysis at the disposal of the Reich." Cf. Hans Venator, *Unitarismus und Föderalismus in den deutschen Verfassungsleben*, 1921.

petence in this drastic manner was held not to prejudice the juristic nature of the States so long as the Reich refrained from exercising its power. If the Reich should in fact transform itself into a unitary State, then the Statehood of the *Länder* would be lost, but until then their status remained unimpaired.<sup>65</sup>

It will have been noted that the rigor with which the discussion of federalism was carried on by Laband, Haenel, Seydel, and their contemporaries was considerably abated with the introduction of the new Constitution. An interesting feature of this process was the return by some writers to the "naïve" theories first put forward in the *Federalist*, and later expounded successively by de Tocqueville and Waitz. As early as 1914 the signs of this return are apparent. In that year Josef Hausmann published an article in which both Seydel, the conqueror of Waitz, and Laband, the conqueror of Seydel, were attacked on the basis of the older theory.

According to Hausmann a primary source of error was the identification of the State in general with the unitary State: that the State's power should be unlimited is characteristic of the unitary State only. Others had made this illimitability the criterion of the State's power and of sovereignty. To this view Hausmann answers "that the content of the State's power is not that it has no bounds, but that it is within its bounds the power above which and next to (*i.e.*, in competition with) which, there stands no other; that is, that it is highest (=sovereign) power."<sup>66</sup> He contended that

<sup>65</sup> Several of the jurists who dealt with the new Reich declined to put forward any too precise solution of the problems involved. Thus Max Wenzel, for example, in his *Juristische Grundprobleme*, 1920, p. 335, comes only to the conclusion that the *Länder* are border-line States (*Grenzfall-Staaten*), and that the Reich is a border-line *Bundesstaat*. Eugen Neuberger, *Die Verfassung des deutschen Reiches*, 1922, also decided that both the *Länder* and the Reich are midway between any accepted concepts. Gerhard Anschütz, *Drei Leitgedanken der Weimarer Reichsverfassung*, 1923, and in his commentary, 3d ed., 1923, passes lightly over the question of terminology and stresses the unitary traits of the new Reich. See also Kahl, *Ausschuss*, p. 23.

<sup>66</sup> "Das deutsche Reich als Bundesstaat," in the *Archiv d. öff. Rechts*, 38 Bd., 1914, p. 84. Walther Rauschenberger's *Das Bundesstaatsproblem*,

since two highest powers in different geographical spheres were not held mutually contradictory, there was no reason why two in different functional spheres should be contradictory. Thus in federalism both the center and the member-States are sovereign in their own functional realms.

In defense of this position Hausmann pushed on to a logical extreme. Sovereignty, he said, must be taken as a formal property of the State's power and not as the individual rights which are to be derived from it. "To be sovereign," he remarked concisely, "does not mean to have all sovereign rights, but to be able to have them"; sovereignty is the subjective capacity to have the highest rights of rulership, but no particular right is necessarily included in it. The old Reich, he pointed out, did not have all rights even though it might by constitutional amendment acquire them. But even if it should do so, even if it should take over every last right of the States, Hausmann held that these would still be sovereign States because they would retain unimpaired the subjective capacity to have the substance of sovereignty. "We have seen," he wrote, "that to sovereignty in the subjective and proper sense no single right of rulership is essential."<sup>67</sup> The member-State shorn of all its actual powers he saw as a potential dormant State, retaining its sovereignty but not the exercise of it, since the latter had been transferred to the central State. When the center relinquishes the powers which have been entrusted to it, then the States automatically are again equipped with the substance as well as the form of sovereignty. The difference between the member-State and the central State, he argued, was not at all a difference in the intensity of their sovereignty, but merely in its extensity.

After the Revolution this essentially simple theory was reduced to the best German complexity by Hans Nawaisky. The result was much the same, but the method considerably more involved. In brief the federal State, according to him,

1920, is at once an attack on Hausmann, and a return to the "rigoristic" interpretation of federalism.

<sup>67</sup> *Op. cit.*, p. 64, note 22. Hausmann once, p. 87, calls sovereignty "the (legal) subjectivity of public law"—a definition obviously overbroad.



was brought into being through the sacrifice to the center by each of the member-States of a portion of its competence on the understanding that the others would do the same. "*A Bundesstaat*," he wrote, "is a union of Commonwealths (in the sense of juristic persons) which are States outside the competence of the *Bund*. Member-States are commonwealths which are States to the extent that they have not transferred an (essentially) identical part of their competence to a State (the *Bundesstaat*) made up from themselves."<sup>68</sup> These definitions, he held, showed clearly that one should not take a federal State to be a State-unity made up of a number of States. "The *Bundesstaat* is itself much more only partial; it represents a central State power which is made whole through a number of complementary individual State powers." Either part taken alone is only partial, but if one starts with either and regards the other as complementary then the full State is arrived at. Furthermore, the center and the parts must be absolutely equal in rank since otherwise one would be superior to the other, and the inferior would then cease to be a State. The two are complementary, and stand in no relation of higher and lower; in consequence the relation between them is one of international law, and not of inner-State law. The relation of each in its own spheres to its subjects is, however, the same as that of the unitary State. This equality is, of course, purely formal. *Kompetenz-Kompetenz* may rest anywhere; Nawaisky did not regard it as an important issue. If, he contended, the center is given competence by the parts to do away with their own existence, then when the center exercises the prerogative which has been given it, one cannot say that it is acting against the will of the parts, but rather in accordance with it as expressed in the original gift.<sup>69</sup>

Sovereignty, for Nawaisky, is highest conceivable power, and hence independent and also indivisible. He will not allow the existence of the non-sovereign State, since if the State is

<sup>68</sup> *Der Bundesstaat als Rechtsbegriff*, 1920, p. 66. Cf. p. 29. Nawaisky "constructs" international law in the same ingenious fashion: each State makes a certain legal prescription part of its own law on the basis that others do likewise, pp. 26 f.

<sup>69</sup> *Op. cit.*, pp. 41 ff.

to be defined as the possessor of highest underived power then it must be sovereign. "Sovereignty," he states, "is simply the description of a property of rulership, of the power of the State, which adds nothing to the latter, but specially underlines something immanent in it." And since the *Bundesstaat* is a State made up of States, it is obvious that both center and parts must be sovereign. Does not this mean that sovereignty is divided between the two factors, he asks himself. "In no way," he answers. "Political power is divided between the *Bund* and the members according to its objects, by competences. Every piece of this divided power is, however, completely identical in kind, equipped with identical properties. Sovereignty is such a property. As in the breaking up of magnetized iron every fragment retains its magnetic property, and the iron, not the property of magnetism, is divided; so in the division of the—necessarily—sovereign State power, it is the State power and not the sovereignty which is divided."<sup>70</sup> How much simpler and more intelligible the statements of Waitz more than half a century earlier!

The more one reads of the German (and, in fact, the American) controversy over federalism, the more, to quote Brunet, is it "difficult to understand the interest in this question." "What difference does it make," he continues, "whether the States are States or provinces, so long as their powers and obligations are strictly defined by the Constitution. From their names alone we can deduce nothing practically informative about their nature. It is an academic question which has not progressed one step in three generations, which one studies but does nothing about, for there is no reality in it."<sup>71</sup> Another French critic remarks on the sterility of the problem, commenting that "in more than a hundred years, the question has not advanced one step."<sup>72</sup>

The continued interest in the question after "more than a hundred years" of failure is perhaps to be explained from two different standpoints. On one hand the problem, like that of squaring the circle, has a certain intellectual fascina-

<sup>70</sup> *Der Bundesstaat als Rechtsbegriff*, 1920, pp. 47-49.

<sup>71</sup> *The German Constitution*, pp. 71. Cf. Oppenheimer, *op. cit.*, p. 36.

<sup>72</sup> H. N. de Prailauné, *L'unitarisme et le fédéralisme dans la constitution Allemande du 11 Août 1919*, 1922, p. 62.

tion. Once one is caught in its toils, escape is difficult until some variety of solution has been "constructed." As one of the perpetually unsolved problems of public law it naturally draws to it the masters who have conquered all other difficulties as well as the young jurist anxious to win his conceptual spurs. On the other hand beneath the theoretical glamor of the problem there is concealed always a significant element of political reality. The problem takes on quite a different aspect if for the general question "Is the *Land* of the German Reich a State or no?" one substitutes the particular question, "Is Bavaria a State or is it merely a somewhat autonomous and indifferent province?" To the first the answer will be theoretical and essentially fruitless, but to the second the answer may be not without weighty political consequences.

## CHAPTER VII

### CONCLUSION—STATE AND SOVEREIGNTY

THE concept of sovereignty has undergone great and significant changes in the course of the last century. In Germany, as has been shown in detail above, there has been a steady and almost uninterrupted tendency to refine it down until by now its substantial elements have almost been reduced to a subtle statement of formal principles. From being the political and juristic expression of the supreme power of a sovereign prince, it has become the formal juristic synthesis of a highly complex system of legal and political relationships. The sovereign is no longer the individual monarch or the assembly of the people, but the abstract person of the State, no longer above, but within, the law, and in fact constituted by the law; while the content of sovereignty has become far more a negative exclusion of other powers than a positive assertion of absolute supremacy. In a word, sovereignty has tended to become a purely juristic concept and has been increasingly dissociated from the actual possession and exercise of political power.

But even in this much modified form it has in the last few years been made the object of a number of violent attacks. It has even been suggested by one authority that it would be to the lasting benefit of political thought if the concept were to be completely surrendered. Internationalism and pluralism have combined to protest that, in the first place, there is no such thing as sovereignty in the modern world, and, in the second, that even if there should be, it is something which should be done away with as rapidly as possible. Sovereignty, it is contended, may have been a useful tool for political and juristic thought in times gone by, but for the modern world it is a dangerous anachronism standing in the way of further progress. It is a matter of the first importance that this challenge be met, since sovereignty has

played a central rôle in modern juristic thought, as I believe has been amply demonstrated above.<sup>1</sup>

The first point that must be made in the discussion of sovereignty is that it is in essence a juristic and not a political or sociological concept: its place is in normative and not in descriptive or, in the narrow sense, scientific thought. It is essential that the distinction between these two possible formal methods of approach be clearly recognized. As Kelsen and others of the Neo-Kantians insisted, one must concede such a dualism, at least as far as methodology is concerned, and failure to do so results inevitably in the wiping out of essential distinctions and the destruction of sharply defined and significant concepts. Primarily the correctness or incorrectness of a normative theory must be judged on, so to speak, internal evidence. To confront the normative with the factual as a means of disproving the validity of the former is to abandon oneself to hopeless confusion. Yet it is out of a confusion of this variety that a large part of the attack on the concept of sovereignty has sprung.

The nature of the formal relation between these two methods of approach is too intricate and fundamental a problem of philosophy to be attacked here. For the present purpose it is sufficient to note that, even though it should be found in the last analysis that they constitute formally two planes with absolutely no necessary points of intersection, they must in the realm of practical thought or of action be closely related. In other words, it might be possible to show that the validity of a value as such is in no way impugned by demonstrating its utter impracticability. Normative thought as such is not invalidated if it be established that the norms set up have no relation to possible experience—here is the field of the Utopia which seeks only to establish what ideally should be, not what is the best of the various things that in

<sup>1</sup> Several important studies in the problem of sovereignty, taking up substantially the same position as that taken here, have recently been published, the most notable among them being: C. H. McIlwain, "Sovereignty Again," *Economica*, November, 1926; John Dickinson, "A Working Theory of Sovereignty," *Political Science Quarterly*, Vol. XLII, no. 4, and Vol. XLIII, no. 1; and W. Y. Elliott, *The Pragmatic Revolt in Politics*, 1928, especially pp. 86 ff.

fact can be. Practically, however, political and juristic thought must keep one eye on what can be while searching for what should be. If the values that we set up are to serve as guides to action they must, broadly, take their substance either from the existing world or from one that can be brought into existence. A normative science deals with ends and the means to those ends; it is formally wholly independent of the translation into practice of the norms thus derived, but it requires practically a certain reasonable correspondence with what can be or what is. The norm must have a reasonable degree of "facticity"; but it is impossible to determine in advance by any formal procedure the exact significance of the term "reasonable."

The validity of a normative concept is therefore not to be tested by examining into its correspondence to empirical reality, but by a procedure compounded of formal logic and value-judgments. The first step is the logical determination of the content of the concept and the formulation of the possible alternatives to it. In other words, we must first, in such a way as to satisfy the conditions of formal logic, formulate the possible alternative goals toward which we might move and the possible means of attaining those goals. Once these are determined it becomes necessary to decide between them in terms of value—either absolute value, if we are constructing a pure Utopia, or relative value, if we are attempting to solve an actual problem of human conduct and organization. A third, and formally irrelevant, step becomes necessary when the norms thus determined and evaluated are actually established as the guiding principles of a given society. We are then in a position to investigate the degree of correspondence between the conduct of that society and the norms which should govern its conduct. In the case of sovereignty, for example, assuming an existing society, we are on one hand able to determine the content of the norms which regulate the exercise of sovereignty in that society and on the other to determine the degree of correspondence between those norms and the actual possession and exercise of power.

Even in the latter case, as has been pointed out above, the existence of occasional contraventions of the norms cannot

be held to invalidate the principle. Occasional violations of a law do not lead us to conclude that the law no longer is valid or should no longer be. That the norms determining the formal location of sovereignty are occasionally violated should no more force us to lament or greet the passing of the principle of sovereignty, than should an occasional unpunished robbery bring us to the conclusion that robbery is included in the accepted scheme of things. That actual highest power may temporarily rest elsewhere than with the normatively defined sovereign is a fact which is too obvious to require statement; but on the other hand there can equally be no doubt that the modern constitutional State has brought about a closer practical coincidence between the legal sovereign and the actual possessor of and wielder of highest power than has ever before been possible.<sup>2</sup>

### ABSOLUTE SOVEREIGNTY

The concept of absolute sovereignty is, as Kelsen has shown, self-contradictory for a descriptive political science, or, in the German use of the term, for sociology. If one sets out either within the State or in the world of States to trace the lines of causal connection it is folly to attempt to include the idea of an original cause moving all things and itself unmoved by any cause outside itself. The same writer has also pointed out the close analogy between the absolute sovereignty of political theory and the absolute God of theology. Either every cause is itself the effect of some other cause, or the whole chain breaks down. It is easy to see how such a theory of absolute sovereignty might originate in an absolute monarchy and be accepted as a statement of the actually existing facts, but even there a moment's thought shows its absurdity. The monarch no less than other men is determined in his opinions by his up-bringing, his environment, his wife, his mistress, his courtiers. His absolute omnipotence is absolute and omnipotent only to the extent that

<sup>2</sup> An interesting analysis of the significance of the principle of constitutionalism in the modern State has been made by W. Y. Elliott, *op. cit.* I am indebted to Professor Elliott, who read the present chapter in manuscript, for much valuable criticism.

it limits itself to the things that it can at the moment perform. If we conceptually transfer sovereignty from the person of the monarch to the State, the will of the latter is obviously equally not formed in a divine absolute vacuum, but is a function of the definite situations objectively presented. The sovereign States of the world find themselves in a catastrophic war not because each in its vacuum had decided that the time had come for war but because all were caught in a web of circumstance which made any other action impossible.

From the sociological standpoint the important thing is not to know that a certain man or body of men, or a certain entity called "State," is authorized independently to frame rules binding on all the members of the community, but to examine the substance of those rules, to learn why men obey or disobey them, to discover the scientific laws actually governing the conduct of men. The sociologist is not, for example, interested in the formal statement that the sovereign may legally declare war on his neighbors as and when he chooses, but wants to examine into the real causes and effects of war. A statute is for the sociologist not primarily a solemn declaration of the will of the sovereign, but the resultant of a host of obscure social forces, which will have certain effects upon the social life of a given community.

But there is no need to take sovereignty as an absolute, a fact which appears to be forgotten by most of its opponents when they launch into their bitterest attacks. As an absolute it is essentially meaningless; as a superlative, as highest power—that is as power higher than all other powers—its value is considerable. Absolute power is inconceivable save as a purely metaphysical concept, and whatever its utility for theology it can have no significance for the modern State even as a regulative idea. But sovereignty taken as a power higher than other powers may have a certain limited use for the political scientist or sociologist, concerned, as he must be, with the analysis of real power. It is conceivably possible to determine at any given time what power is in fact the strongest, what will issues commands which are habitually obeyed without itself being the object of commands (as



such) addressed to it; but even when this calculation has been temporarily brought to a successful conclusion, the resulting "sovereign" is by no means necessarily to be regarded as identical with the sovereign of juristic thought.

It will be evident from the above that the writer draws a sharp distinction between political (or substantial) sovereignty and juristic (or formal-normative) sovereignty. The latter is conceptually precise and determinate, while the former is fluctuating and indeterminate. Political sovereignty consists in the actual holding and exercise of power, but real power is nothing that one can define or locate precisely for any extended period of time. It rests with the people, with the press, with the parties, with the financial and industrial interests, and with innumerable other factors. On Monday it is in the hands of the parliament, on Tuesday of the executive, and Wednesday sees it slipping into the hands of the statesman who spoke on Tuesday night. The sovereignty of the king in parliament, for example, is an undoubted juristic fact, but it is by no means necessarily a political fact as well. Real power may quite easily at any given moment rest elsewhere, and the form of juristic sovereignty remain wholly unchanged. To be sure the latter will tend to follow the former, but it is impossible to determine precisely the relation between them.<sup>3</sup>

The sociologist exposes that the State is not the world, that the sovereignty legally to be attributed to the State is far from being a factual omnipotence and omnicompetence, and that political power is not one but many. It is good to know these things and keep them in mind: the jurist, fascinated by his forms, formulas, and concepts, is perhaps too prone to seem at least to forget them. But it must be insisted that after they have all been said and have all become commonplaces of thought, the heart of the juristic concept of sovereignty remains untouched. And the sociologist himself is by no means always guiltless. His occasional diatribes

<sup>3</sup> "The term 'sovereign' has no proper application beyond the domain of law. . . . Sovereignty is authority, not might. The sovereign power is the highest legal authority, *qua* legal not *qua* actual. In a State of mature development actual power and legal authority might be identical or nearly so, but they seldom are and for various reasons." McIlwain, *op. cit.*, p. 256.

against the jurist—when he stoops to notice him—appear too often to ignore that he and the jurist are not speaking the same language. The term “sovereignty,” for example, has a different significance for each.

When the jurist asserts the sovereignty of the State, he does not mean that the State as represented by one or several of its organs can unconditionally enforce obedience to any command whatsoever which it may choose to issue. He does not mean that all power or even the greater part of all power is actually in the hands of the State. He does not mean that the sphere of competence of the State is boundless in the sense that in fact the State can arbitrarily take to itself the rights vested in other persons, individual or corporate. What he does mean is that it is a normative principle of political organization that the expressed will of the State takes legal precedence over all other wills. It is so easy a task to ridicule the juristic assertion that the State can will what it likes and enforce its will against any opposition that it must cause the humorist to doubt whether he has not underestimated the intelligence of those whom he is combating. Jurists who had witnessed, say, the *Kulturkampf*, and were in their right minds, could scarcely assert the factual omnipotence of the State, but they were wholly justified in continuing to assert that the normative principle of sovereignty was recognized in the German Reich. If the result had been that Berlin was under orders from Rome or that the will of the Reich was subordinated to the papal will, then there would have been occasion to consider the question as to whether the sovereignty of the Reich had passed into other hands; but as it was there was merely further proof, if any were needed, that the juristic sovereignty of the State was a far different thing from factual omnipotence.

Political power is dependent upon the allegiance of men. It may be won or lost by the turn of a phrase. Highest political power means the ability to capture the effective allegiance of the greatest or the strongest numbers. A State which wills such things as destroy that allegiance as inevitably sacrifices its sovereign power as did the Stuarts and the Bourbons their thrones. It is important to know what

power is likely to prove highest, but it is impossible to ascertain it *a priori*. The conditions upon which society is founded are so infinitely complex that prediction of what causes will produce what effects must, for the present at least, be founded rather on shrewd intuition than on scientific analysis. If one wishes certainty the furthest that one can go is to say that that will which at the given juncture can command the most effective and widespread allegiance will be the strongest. To identify that will in advance with the State, the Church, the trade union, the employers' federation, or any other group or person is to run obvious risk of error.

If we are to attempt such an identification we can do so only with the proviso that the highest will must be a reasonable will, a will neither attempting the impossible nor antagonizing the allegiance upon which it must inevitably rest. But such a qualification implies a passage from the realm of *Sein* to the *Sein-Sollen*. We say in that case not that the will of the State is sovereign, but that if it desires sovereignty it must act in such and such fashion. If we take sovereignty as highest political power and highest political power as the command of the effective allegiance of the greatest or strongest numbers we have made little progress toward demonstrating either how such allegiance may be won or who is the possessor of sovereignty. The analysis of what is and what has been makes it possible for us to arrive at certain broad provisional generalizations, but it is impossible to dignify these with the name of law as that term is applied in the natural sciences. The concept of sovereignty is, then, primarily important for the normative rather than the descriptive method of approach. A theory of sovereignty will tell us not where sovereignty is or will be in fact, but where it should be.

Once this distinction has been drawn, the first necessity is to redefine the concept in such a way as to make it applicable to modern political thought and reality.

## SOVEREIGNTY AND ANARCHY

The concept of sovereignty has known many variations, but always upon a single theme. Sovereign power is always highest power. The classic attributes of indivisibility and illimitability follow as logical consequences of this fundamental attribute of being highest: the sovereign is indivisible since to divide is to make two or more powers, either coördinated in which case neither is higher, or to range one above the other, in which case the higher becomes by itself sovereign; and is illimitable since limitation implies a higher limiting power. The attribute of absoluteness cannot, however, be so deduced. It has significance only if we take it to mean that the sovereign is absolutely the highest power, which is redundant. In another sense, absolute sovereignty might be taken to mean absolute highest power in relation to all other powers whatsoever which, clearly, has not been the meaning attached to the concept in the realm of international affairs. Here the idea of highest power has always been limited to highest power in a given (geographical) sphere. No one, save perhaps in the attempt to demonstrate the absurdity of the notion of absolute sovereignty, has ever argued that to term a State sovereign meant to rank it as sovereign over all other States. Internally absolute sovereignty can only mean that the sovereign is, or is regarded as, the source of all power whatsoever and that any power exercised within the State is legitimate only in so far as it is delegated by the State. It was this theory that Gierke combated in his monumental attack upon the Romanistic conception of fictitious juristic personality.\*

The simplest and most direct means of arriving at a definition of sovereignty fitted to the modern world is by comparing it with the only possible formal alternative to it, anarchy. Anarchy means the absence of any power normatively superior to any other. In its simplest terms it means that there should be no power above the individual competent to coerce him into the performance of anything other than the content of his empirical will. In the ever fruitful

\* Cf. *supra*, pp. 131 ff.

field of natural law it was the assumed condition of mankind prior to the contractual erection of a sovereign.

The concept of anarchy is not, however, limited to the sphere of the individual, although it is probable that almost every theory which denies the validity of sovereignty must, if thought through to its logical conclusion, come finally to anarchy in terms of the individual as the ultimate ethical unit. But there may be as well an anarchy of groups, and it is anarchy of this sort that has figured chiefly in political thought since the *Genossenschaft* made its appearance as a self-created and autonomous person. To be sure, this trend of thought usually takes to itself the name of pluralism, but a pluralistic system of groups each not subjected to any higher power is as certainly anarchy as is a similar pluralistic system of individuals. A state of anarchy exists whenever there are two or more powers each with a potential claim to competence over the same sphere and not normatively subject to the decision of a higher power. It is no more and no less anarchy if the miners and the mine-owners are each final judges as to their possible conflicting rights than it is if Jones and Brown are placed in the same position.

But anarchy is not to be dismissed merely by whispering its name in tones of horror. Whether it be taken as an extreme individualism or in the less obvious form of group pluralism it has attracted many thinkers to its standard. As a philosophical ideal it is and has been accepted by many who still maintain the need for organized and ultimately coercive power above individuals and groups in any future that we may reasonably look forward to. The two are clearly not incompatible. It is wholly possible to regard sovereign power as the necessary means to the end of a truly self-governing mankind. Assuming man to be imperfect but perfectible, we assign to the sovereign the task of so disciplining and training him as to make him ultimately capable of leading the good life without the aid of external authority. But there is an immeasurable distance between such a view and the view that the need for restraint and for enforced common action has already passed.

The principle of anarchy asserts that the resolution of

any conflict which may arise must be left to the free decision of each individual unit. A logically complete theory of sovereignty on the other hand asserts that wherever there are possibly conflicting spheres of rights and interests there must be a higher power competent to settle the lines of demarcation. Any stopping-point short of this formal ideal can never be justified on formal grounds, but only on the grounds of desirability or necessity. If one admit the necessity of external authority over individuals and groups, it is impossible to see how one is logically to limit the extent of the community over which the highest power is to have sway. The basis for such limitation can only be the assumption that there are certain "natural" groups, which, by their nature, cannot be superseded. At the present day this argument is most commonly employed in favor of the nation-State, but the guild socialist tends to use it on behalf of the guild, the churchman on behalf of the community of believers, and other associations follow in their path. There can be little doubt that any such plea is historically conditioned and that the general tendency of human history has been continually to extend the boundaries of the group owing allegiance to a common sovereign.

These, so to speak, spatial limitations of sovereignty must find their justification in other spheres than those of logic. It is suggested that their basis must be psychological. Logically all interests are partially conflicting, and, assuming the use of constraint to be justified, we want to place all conflict under the control of external authority. The extent to which that is possible is determined by the extent of the allegiance which authority can command. In other words that authority with which we feel our permanent interests to be most closely identified will be able to make the most effective claim upon our allegiance. It is not enough that our interests are actually bound up with the interests of others: there must further be a recognition of that connection. In consequence, it is futile to attempt to erect a sovereign power over a sphere wider than that within which men feel their vital interests to be permanently contained.

The decision as to which of the two formal principles,

sovereignty and anarchy, should be recognized for society depends in the last analysis on the justifiability of the use of coercion. Anarchy may be defended from two different standpoints. It may, in the first place, be asserted flatly that it is wrong ever to coerce the individual and that the individual conscience must be left free to judge for itself and to act upon its judgment. To such an assertion there is no adequate answer save an equally flat denial. It can neither be proved nor disproved. In the second place, it may be argued that society will not only not suffer but will gain by the removal from it of external authority. The individual in this view will all the more readily respect the freedom of his neighbor and fulfil his social duty if he realizes that the decision is his own and that no external power stands menacingly above him. There is much to be said for such a position: the reaction to the threat of compulsion is almost always one of enhanced defiance; but it is most doubtful that the argument is sufficiently cognizant of social reality. Man may be perfectible, but certainly he is not yet perfect. Neither as an individual nor as a member of an association is he willing to relinquish the appeal to force as the ultimate judge of his claims. Nor is the situation any more encouraging if we turn from the individual to the group. The records of industrial disputes can scarcely be held to justify the view that associations of men will recognize the necessity for coöperation and amicably settle their disagreements. The guild socialist will occasionally disregard the accusation that his system leads to a formal anarchy of groups on the grounds that in time of need *ad hoc* bodies will be devised to adjust the conflicting claims. There seems slight necessity to do more in answer to this contention than to point out that such a situation already exists in international affairs, and that while usually some means of adjustment is discovered, on occasions the always potential *bellum omnium contra omnes* becomes a fact overwhelming in its consequences. Formal anarchy, it is to be feared, always carries within itself the seeds of its transformation into actual war.

But the case for the justification of the use of compulsion is not an absolute one: the question may be reopened at any

time and at any place. All that it is possible to decide is that the balance of evidence concerning a given society at a given time points in one direction or the other. The present state of society does not allow of the judgment that society can be maintained without the right of an ultimate appeal to force not only in its own interest but also in the long-run interests of both the individual and the group.

### THE PRINCIPLE OF SOVEREIGNTY IN OPERATION

So far it has been argued that society, without which man cannot exist, requires for its maintenance and for the protection of its members the right of compulsion. Further, it has been indicated that the admission of the necessity of this right implies the justification of sovereignty, since if we concede the necessity of external authority as the ultimate judge in case of conflict we can find no logical resting-place until we have come to the highest possible external authority. The question now arises as to how that highest authority should be constituted, and what should be the spatial sphere of its activities. It is this question of the organization through which supreme power is to be expressed, of the concrete content of sovereignty rather than its abstract formulation and evaluation which is at the heart of most modern attacks upon the concept.

The elaborate case for the concept of sovereignty as a philosophic or juristic principle is admirable, it may be contended, but has it any application in the modern complex world? The pluralist will point to the federal State as proof of his contention that sovereignty is not a necessary feature of an organized society, and the internationalist to the network of international ties and relationships which in fact impose themselves upon the supposedly sovereign State. Furthermore, it may be objected that this same sovereign State, even in its internal aspects, is only a sham since, broadly speaking, it does not include within its formal structure the immensely powerful new public persons which modern industry has brought into being. These objections are sufficiently formidable to require a somewhat detailed answer. I will take up first the problem of federalism.



When we say that a given society is self-governing we mean that it determines its own ends, erects its own political organization, and sets the rules according to which it shall live; in brief, that it is sovereign. This characterization undoubtedly fits such federal States as Germany and the United States, disregarding in the former case the abnormal circumstances resulting from the War. They are both self-governing and sovereign in the sense that they arrange their lives according to their own ideas. The federal State from this standpoint is no less sovereign than the unitary State, but essentially all that has been said here is that the self-governing society, be its internal organization pluralistic or unitary, is not bound by the orders of any external authority.

The real difficulty arises when one attempts to locate within that society the "determinate superior" which exercises sovereignty. If we say that a society has highest power over its own affairs, we must imply that it has an organization through which that power can be exercised if the statement is not to be meaningless. The sovereign must be capable of action or its highest power is a mere form of words. Here is the weakness of such a theory as that of Krabbe which makes the law sovereign. The law by itself is incapable of action. It may determine normatively the limits within which action is possible or affix certain consequent actions to prior ones, but it itself, as a body of rules, does not act. While it is true that in the modern *Rechtsstaat* the sovereign cannot act otherwise than in compliance with law, it is equally true that he sets the law in accordance with which he is to act. The law lays down the formal procedure by means of which it can be changed, but the power which formulates and brings about the change is not the law itself. When the sovereign legislative body passes a law it acts in accordance with law, but that does not entitle us to say that the law has created a law. The same argument applies, of course, to the attempt to escape the difficulties of federalism by terming the constitution sovereign. It is not the constitution which acts, but the powers constituted by it.

If sovereignty is not to be adapted to federalism in this

way neither is federalism to be adapted to the classic concept of sovereignty by taking away from it every feature which distinguishes it from absolutism. As was remarked above we shall arrive at no satisfactory theory of sovereignty by such ingenious fictions as that the central State—sovereign as Louis XIV and Frederick the Great were sovereign—created the member-States and made them an always revocable loan of such competence as it chose.

Is this to admit that the federal State knows sovereignty externally but not internally? The answer is that the problem of federalism came closer to solution with the *Federalist*, de Tocqueville, and Waitz, than it did with the later writers who went to the defense of the classic concept of sovereignty. The attempt to find a simple determinate organ through which an absolute and all-absorptive sovereignty was exercised was doomed to failure since it is of the essence of federalism that power is divided. A theory of sovereignty applicable to federalism must recognize that division, and nothing is to be gained by sacrificing the reality to the inherited concept.

In Germany, for example, it was possible for Ebert, on behalf of the provisional government, to greet the National Assembly at Weimar as "the highest and only sovereign in Germany," adding that they were finished forever with "the old kings and princes by the grace of God"; but once the new Constitution had been established even that was no longer possible. In a constitutional federal democracy, sovereignty, save by the grace of fiction, cannot be attributed to any single organ: it can have significance there only as an abstract formal principle, normatively determining the relations and functions of the several organs. Even in the democracy uncomplicated by federalism it is often not easy to discover any single organ which can be regarded as sovereign as the absolute monarch was sovereign. Political power "rests in" the people or, as the Weimar Constitution expresses it, "emanates from" the people, but its exercise is for the most part delegated to some other organ or organs of the State. The parliament is in some States, as in England, for example, sovereign since its will cannot be overridden by

any other body; but in a country such as the post-revolutionary Germany the referendum and other extensions of democracy make it possible on occasion for the people to vindicate their sovereignty as against their representatives. Furthermore, the separation of powers and the system of checks and balances do in fact derogate from the sovereignty of any particular organ, even though this difficulty can, from the formal standpoint, be surmounted.

Full sovereignty is not to be found in the hands of any organ of the federal State, whether that organ be the people or the representatives of the people in a Reichstag or Congress. It can then, as the German jurists concluded, be vested only in the State. But the problem immediately arises as to which of the several possible States is to be regarded as sovereign. Seydel and Calhoun to the contrary notwithstanding, it need scarcely be argued at the present day that the member-States are not sovereign. But much the same argument as that which strips the member-States of sovereignty can be used against the claim of the central State. Through the use of the doctrine of *Kompetenz-Kompetenz*, it is true, the central State may be fictitiously inflated until it has required the dimensions traditionally required of a sovereign. But the ingenious "construction" cannot conceal the fact that actually both power and spheres of competence are divided between the member- and the central States.

The sovereignty of the federal State, as Haenel and Gierke saw, cannot be that of either the central State taken alone nor that of the member-States, since neither of these represents the whole organized political power of the community. The self-governing community is sovereign as a whole: the whole State which is its organized political form cannot be other than both the member- and the central States taken together. The organs through which this composite State exercises its sovereignty are the whole system of political organs existing in the community. No single organ can claim to be the bearer of the sovereign power resting ultimately in the community as a whole because that power is divided between a number of organs each limited to strictly defined functions. If one would seek the determinate

superior, one must ask first for which function that determinate superior is sought.

How, it may be asked, does federalism differ from pluralism if the nominally sovereign power of the community is in fact split up among a number of different organs? The answer is simple. The whole system of political organs of the community is so organized as to constitute a highest power competent both to undertake any changes in the *status quo* and to enforce the settlement of any possible conflict within it. For every possible issue which can arise provision is made for a highest power competent to deal with it. It is precisely the nature of federalism that, on one hand, there is no single organ in which full sovereignty is vested, and, on the other, as contrasted with anarchy, that the principle of sovereignty is recognized. And this principle states that there must be such a division of function and competence as to allow of the legal settlement of any possible conflict between the several organs of the State, each autonomous in its own sphere, and to undertake such additions, subtractions, and redistributions of function as the development of the community necessitates.

Admittedly such a statement of the concept of sovereignty lacks the simplicity of the Austinian definition. It has, however, the virtue of being applicable to modern political fact, which the Austinian, undiluted by fictions, has not. In the modern federal State it is impossible to give a simple and ready answer to the question as to where the single determinate superior is to be found. The first answer must be, Examine the constitution of the given State. But even the constitution will not present us with the single superior called for by Austin.<sup>5</sup> It fixes not the one highest power, but a highest power for each of the several *non-conflicting* functions. A federal constitution states that certain functions are to be performed wholly independently by one power, others by another, and still others by the two acting concur-

<sup>5</sup> John Dickinson, *op. cit.*, XLII, 540, says of the United States, as contrasted with Great Britain, that "here the sovereign consists not of two organs but of a whole system of organs, geared together into a complicated pattern."

rently. It lays down further which of the two is to be regarded as superior in case of conflict, or places somewhere authority to decide between the conflicting claims. In addition it describes the process by which some organ or system of organs is authorized to alter or add to the spheres of competence. In brief, federalism recognizes the necessity of fulfilling the conditions imposed by the principle of sovereignty as opposed to the principle of anarchy.<sup>6</sup>

It is exactly here that federalism differs from pluralism. Pluralism ends, if it lives up to its name, in a plurality of highest powers, each, as in federalism, highest in its own sphere, but with no assurance that if those spheres chance to conflict or if readjustment becomes necessary the change can be made without a violent breach of the existing order. Pluralism opens wide the gates to conflict between groups, to a Darwinian struggle of groups; federalism insists that there shall always be a highest power authorized to keep the peace.<sup>7</sup> The United States and Germany are federal; the international community, save to the extent that the League of Nations has altered it, is pluralistic.

A problem far less concerned with formalisms and definitions is that presented by the objection to sovereignty as postulating an all-inclusiveness which it cannot actually attain. In a slightly different rendering this accusation

<sup>6</sup> The only way in which it is possible to conjure up in federalism the determinate superior of Austin is to call sovereign that organ or system of organs which is empowered to bring about changes in the constitution; but that construction is far from satisfactory. The sovereignty of this amending body comes into play only at the rarest intervals. In the usual course of events it has no part at all; it is, if not nonexistent, at least dormant in the long span of years that may intervene between constitutional amendments. Furthermore, it may be, as in the United States, a highly cumbersome system of organs, the single operations of which extend over a period of months or years. If it be objected that these considerations are juridically irrelevant, the only answer must be that here is a situation where a logically consistent normative statement does not possess the required "reasonable" correspondence to the facts. Nothing is to be gained by clinging to an antiquated definition which can be applied only by distorting reality beyond recognition.

<sup>7</sup> "A political system which does not contain an effective provision for a peaceable solution of all controversies arising within itself, would be a government in name only."—James Madison, in Farrand's *Records of the Federal Convention*, 1927, III, 537.

stresses the "moral inadequacy" of the theory of sovereignty. The argument here is that a sovereign will claiming the right of ultimate decision and coercion is morally justified only in so far as it succeeds in embodying the wills of those whom its decisions affect. And further, that its sovereignty is only a delusion of grandeur if it fails to control and to include in its formal system of organization the powers actually determining the life of the community.

It will be seen that neither of these objections is an objection to the principle of sovereignty itself, but only to particular applications of it. To be sure, any highest power, however ingeniously organized, will in the last analysis prove morally inadequate, but the same inadequacy must inevitably attach to any form of human organization. The choice is admittedly a choice of evils: sovereignty and anarchy are each in their respective ways morally inadequate, and the choice between the two must rest not on an absolute consideration of either alone, but on a weighing of their relative merits and defects.

Suppose it to be established that the existing form of the sovereign State is both morally and practically inadequate: is it not possible that the fault lies less in the principle of sovereignty than in the method of organization? To discard the principle of sovereignty is to accept the contingent threat of chaos that appears whenever two or more formally equal powers stand opposed to each other with no higher power authorized to decide between them. If the present system of the organization of sovereignty is to be changed for a better one it must be in such a way as to make that threat of chaos always less likely of fulfilment. The organization of the sovereign power of the community—whether it be the national or the world community—must be such as to make its will as far as possible identical with the general will of the community.<sup>8</sup> If it is not thus identical it sacrifices not

<sup>8</sup> The attempt to give a precise statement as to what is meant by the use of the phrase "general will" here has been deliberately omitted as going beyond the needs of the argument. It is used not in any exact sense, but merely to indicate that general community of interest which must underlie any long-continuing association of men. Cf. T. H. Green, *Principles of Political Obligation*, and W. Y. Elliott, *op. cit.*

only its moral justification, but, in the long run, its chance of securing effective allegiance as well.

The same, of course, holds true of the proposition that sovereignty becomes merely a phantom unless it is directly inclusive of the vital forces acting in the community. The sovereignty of virtually every existing State is increasingly threatened by the existence, outside its formal organization, of great power over which it has no direct and effective method of control. The result is that the community as a whole is in constant danger of the disruption attendant upon the existence of powers able to make good their will against the general will of the community. As with the moral inadequacy of sovereignty, so likewise its practical inadequacy must be corrected not by abandoning the principle of sovereignty, but by so ordering the political organization of the community, as to make its will both morally justified and practically effective.

The problem of the future—or, more accurately, of the present—is the building of the federal State of the world. We have seen enough of pluralism, of the anarchy of coördinated sovereigns recognizing no superior, to know that the community of the world must be so organized as to give its interests predominance over the interests of its recalcitrant members. It must be sovereign, not in the Austinian sense of being a determinate superior habitually obeyed and not habitually obeying, but in the federal sense. That is, it must not seek to draw to itself all powers and it must not be merely a name for a single absolute or potentially absolute organ. It must not be the instrument through which all the infinitely fruitful variety of the world is beaten down by the bureaucrats into a sterile uniformity. The history of federalism is too long and too filled with success to make possible the plea that these things are necessary if the principle of sovereignty is to be recognized.

And yet the world State must be able to guarantee that particularism, whatever its nature may be, does not carry the day and impress or attempt to impress its particular brand of variety upon the rest of the world. It must recog-

nize that, in general terms, the present nation-State is the final judge of its own internal affairs and rightfully possesses an independent power in its own sphere, as that independence has been conceded in the other federal States which we already know. Presumably it must include in its formal organization other powers than the States themselves; that is, its federalism must be functional as well as geographical.

It must through the whole system of its organs have highest power to settle conflicts in terms of the interests of the whole world and to initiate such readjustments of competence as the historical development of the whole and of its parts make necessary. Its moral claim to sovereign power must be founded upon its practical ability to further the interests of the vast community in whose service it functions.



# INDEX

- Absolutism, 3, 4, 19, 23, 28, 34, 51, 55, 58, 59, 91, 92, 130, 131, 148, 214, 215 n., 268.  
 Ahrens, H., 26 n., 40 f., 43, 96.  
 Albrecht, W. F., 33, 52, 53.  
 Allegiance, 260, 261, 264.  
 Althusius, J., viii, 39, 92.  
 Anarchy (*see also* Sovereignty and anarchy), 148, 181, 201, 204, 215, 218, 271, 273.  
 Anschütz, G., 33 n., 36 n., 78, 236, 249 n.  
*A priori*, 156, 163, 167 n., 180 n., 181, 261.  
 Aristocracy, 30, 199 n.  
 Aristotle, 75.  
 Arndt, A., 76 n., 215 n., 247, 248.  
 Assembly, National, Chap. VI, and p. 268; representative, 69; share in legislation, 71.  
 Associations (*see also* *Genossenschaft* and Corporation), 131, 132, 134 ff., 141, 152; non-territorial, 152, 153.  
 Attribution, 169, 170, 173, 175, 202.  
 Austin, 201 n., 270, 271 n.  
 Austria, 18; Constitution of, 167.  
 Authoritarian principle, 210.  
 Auto-determination, 64, 110, 114, 118, 143.  
 Auto-limitation, 59 ff., 71, 72, 76, 77, 83, 84, 92, 99, 108, 112, 141, 143, 146, 205.  
 Bähr, O., 2 n., 37 f., 39, 41, 77, 81.  
 Barker, E., ix, 152.  
 Barthélemy, J., 51 n., 76 n.  
 Bavaria, 101, 247, 253; Constitution of, 76, 92 n.  
 Beard, C. A., 229 n.  
*Begriffsjurisprudenz*, 49 f., 64, 240.  
 Belgium, 23, 198, 236.  
 Bergbohm, K., 159 f., 186.  
 Berlin, 212, 221, 260.  
 Bernstein, E., 216 n.  
 Berolzheimer, F., 183, 186 n., 195 n., 198, 199.  
 Berthelot, M., 216 n., 231 n.  
*Bestimmbarkeit*, 110.  
 Beyerle, K., 243.  
 Bierling, E. R., 199 n.  
 Bill of Rights, 216, 229.  
 Binder, J., 161 n., 162 n., 165 n., 166.  
 Binding, K., 200 n.  
 Bismarck, vii, 1, 18, 23, 47, 75, 106, 125, 218, 237, 240, 245.  
 Bluntschli, J. K., 2, 5, 24, 29 ff., 45 n., 47, 122 f.  
 Bodin, 63, 102, 214.  
 Bolshevism, 216, 222.  
 Bonn, M. J., 226.  
 Borel, E., 94 n., 119 n.  
 Bornhak, C., 76 n., 77 n., 109 n., 114, 115 n., 212, 213 n., 228 n., 236, 245, 246, 247.  
 Bourbons, 260.  
 Braune, F., 25 n.  
 Bredt, J. V., 216 n., 223 n., 238.  
 Breuer, L., 162 n.  
 Brie, S., 58, 93 n., 118, 120 ff., 190, 206 n.  
 Broh, J., 222 n.  
 Bronikowski, Oppeln, von, F., *see* Oppeln-Bronikowski, von, F.  
 Bruhl, Lévy, L., *see* Lévy-Bruhl, L.  
 Brunet, R., 217 n., 220 n., 229 n., 252.  
 Bülow, O., 157 n.  
*Bund*, 98, 105, 121, 251, 252.  
*Bundesgewalt*, 98.  
*Bundesrat*, 105 f., 123, 210, 211, 213, 239, 242 n.  
*Bundesstaat* (*see also* Federalism), 94 f., 97, 98 n., 104, 108 n., 110, 112 f., 115 ff., 118, 120, 121, 122, 124, 147, 185, 242, 247, 248 n., 249 n., 251, 252.  
*Bundesstaatsbegriff*, 101.  
*Bürgerliches Gesetzbuch*, 157 n.  
 Burke, 12, 24.

- Calhoun, 93, 96, 97, 99, 269.  
 Cameralists, 4.  
 Capitalism, 136, 217, 221, 226.  
 Carlsbad decrees, 21.  
 Cathrein, V., 158 f., 160 n.  
 Center, 220, 228.  
 Central Council, 218, 220.  
 Central State, *see* State.  
 Church, 29, 53, 260, 264.  
*Civitas maxima*, 179.  
 Codification, 209.  
 Coercion (*see also* Compulsion, Force), 61, 71, 73, 104, 109, 164, 187 f., 195, 199 n., 262, 263, 265, 272.  
 Cohen, M., 218 n., 223, 227 n.  
 Cohn, O., 223 n., 229 n.  
 Commissars of the People, 218, 220.  
 Commune, 137, 138, 140 n., 149.  
 Communists, 216 n.; doctrines, 45; Manifesto of 1848, 45.  
 Competence, 109, 110, 113, 114, 116, 117, 119, 121 n., 135, 194, 240, 246, 248, 251, 252, 258, 263, 268, 270, 271, 274.  
 Compulsion (*see also* Coercion, Force), 141, 180 f., 201, 265, 266.  
 Confederation, Act of (1815), 20; German, 17; North German, 47.  
 Congress of Councils, 218, 220.  
*Conseil d'État*, 78.  
 Constitution, Imperial, 1, 47, 102; of 1867-1871, 213; of 1871, 113, 210; of 1919, Chap. VI, and pp. 1, 133, 149 n., 150, 207 n., 211, 215, 268.  
 \* Constitutional Committee, 229, 243.  
 Constitutionalism, 4, 16 ff., 23, 35 ff., 36, 55, 79.  
 Corporation, 134, 135, 137, 151; territorial, 137, 138, 146, 205.  
 Councils, Workers', 221 f.  
 Courts, 78, 81, 85, 90, 234.  
 Curtius, J., 219 n.  
 Däumig, E., 222 n., 223 n.  
 Dante, 11.  
 David, 231.  
 Delbrück, von, C., 215 n., 217, 229 n.  
 Democracy, 24 n., 182 f., 199 n., 215, 217, 218, 221, 234 n., 236, 269; parliamentary, 218, 224 ff., 230, 231.  
 Democrats, 215, 220, 221, 228.  
 Despotism, 3 f., 5, 181, 217.  
 Dickinson, J., 255 n., 270 n.  
 Diet, United, 21.  
 Divine right, 7, 26, 53 n., 75, 127, 268.  
 Dock, A., 5 n.  
 Duguit, 51, 59 n.  
 Ebers, G. J., 238.  
 Ebert, 212, 221, 268.  
 Ego, sovereign, 8.  
 Ehrlich, E., 157 n.  
 Eisner, K., 228 n.  
 Elliott, W. Y., 255 n., 257 n., 272 n.  
 Empiricism, 155 f.  
 Engels, 45, 216 n.  
 England, 10, 46 n., 148, 233, 268; influence on Germany, 38.  
 Era, constitutional, 213.  
 Estates, 27, 31, 55, 79.  
 Executive (*see also* Kaiser, King, Monarch, Sovereign), 79 ff., 84, 88, 96, 213.  
 Federalism, Chap. III, and pp. 42 n., 56, 57, 73, 128, 142, 143, 146 ff., 153, 173, 195, 196, 206, 214, 216, 218, 235, 266, 267, 268, 270, 271, 273; American influence on, 93 ff.; and monarchy, 96, 105, 122 ff., 241; new, 236 ff.; new theory of, 146 ff.  
*Federalist*, the, 93, 214, 249, 268.  
 Fichte, vii, 8 f., 13 n.  
 Finer, H., 231 n.  
*Fiscus*, 34, 86, 90; 131, 140.  
 Force (*see also* Coercion, Compulsion), 181 f., 199.  
 Formalism, 174 ff.  
 Fourier, 43.  
 France, 22, 28, 85, 147, 148, 233.  
 Frankfurt, Constitution of 1849, 35, 37, 92; Parliament, 22, 25, 93, 94, 216.  
 Frederick the Great, 2 f., 4, 10, 33, 34, 128, 268.  
 Frederick William II, 4.  
 Frederick William III, 24, 25.  
 Frederick William I, 19, 21 ff.  
 "Free Law School," 50 n., 157.  
*Freistaat*, 45, 239 n.

- French Revolution, 5, 7, 11, 28, 47, 211.
- Functionalism, 223, 225, 250, 274.
- Gagern, von, H., 22, 25.
- General will, 182.
- Genossenschaft*, 42, 43, 190, 263; nature of, 132 ff., 151 f.; and political theory, 150 ff.; school of, Chap. IV; and sovereignty, 142 ff.; and State, 136 ff.
- Gentz, von, F., 24.
- Gerber, von, C. F., 19 n., 33, 48, 49, 51 ff., 58, 60, 65, 68 n., 74 n., 78 n., 81, 96, 103 n., 109, 129, 142, 187 n.
- Gerlach, von, 25.
- German Republic, 212, 231, 242.
- German Revolution, *see* Revolution of 1918.
- Germany, *passim*.
- Gesamtstaat*, 14 ff., 147 f., 173, 246.
- Gewalt*, 190.
- Geyer, K., 222 n.
- Gierke, von, O., vii f., 2 n., 12, 39 n., 50, 59, 69, 71, 74 n., 93 n., 104, 114, 115, 129 ff., 143, 144 ff., 150, 152 ff., 173, 190, 246, 262, 269.
- Giese, F., 231 n., 243, 244 n., 247 n.
- Gnaeus Flavius, *see* Kantorowicz, H. U.
- Gneist, von, R., 33 n., 35 n., 38, 41, 42, 44, 45, 77, 78, 223.
- Goethe, 10.
- Gooch, G. P., 5 n., 10 n., 13 n., 26 n., 211 n., 228.
- Gottinnigkeit*, 40.
- Great Elector, 2.
- Great Society, 127, 128.
- Green, T. H., 272 n.
- Guild socialist, 264, 265.
- Gutmann, F., 219 n.
- Haase, 229 n.
- Haenel, A., 64 ff., 70 n., 71, 83, 88, 107, 114 ff., 118, 142, 147 n., 190, 245, 249, 269.
- Haller, von, K. L., 19, 20 n., 26, 32 n.
- Hasbach, W., 234 n.
- Hatschek, J., 233, 233 n.
- Hausmann, J., 249, 250.
- Haussmann, K., 242, 243.
- Hegel, viii, 3, 11 ff., 16, 20, 23 f., 26, 28, 29, 30, 39, 40, 44, 46 n., 47, 48, 52, 129, 155, 156, 186, 187, 188, 192 n., 193, 208.
- Hegelian civil society, 39; dialectic, 12, 43, 186, 190, 192 n.; idea, 13; system, 11, 12, 14, 15, 41, 186.
- Hegelianism, modified, 192 ff.
- Held, von, J., 52 n., 100, 113, 115.
- Heller, H., 52 n.
- Henke, A., 222 n.
- Herbart, J. F., 40.
- Herrfahrdt, H., 219 n.
- Herrschaft*, 53, 68, 85, 101, 103 n., 104, 112, 119, 122, 137, 190, 236, 248.
- Herrschaftsrecht*, 103 f., 106, 109, 113, 114, 119, 198, 250, 252.
- Herrschergewalt*, 5, 109, 205.
- Herrschermacht*, 85.
- Hertling, von, G. F., 158 n.
- Hierarchy, 77, 92.
- Hinneberg, 78 n.
- Historical School, 28 f., 48.
- Hobbes, 60 n., 235.
- Holy Roman Empire, 1.
- Hubrich, F., 244, 245, 247 n.
- Humboldt, von, W., 9, 10, 13 n., 19.
- Ideal, Kantian, 6.
- Idealism, 47.
- Ihering, von, R., viii, 49, 50 n., 60, 61, 119 n.
- Independent Socialists, 221, 227.
- Individualism, 8 f., 161, 230, 263.
- Industrial Revolution, 43.
- Internationalism, 254, 256.
- International law, 63, 65, 71, 73, 74 n., 95, 141, 143, 145, 166, 177 ff., 183 ff., 188, 191, 192, 195 ff., 203, 206 f., 215 n., 251.
- Italy, 147.
- Jacobi, F., 246.
- Janet, 26 n.
- Jellinek, G., viii, ix, 33, 49 n., 59 ff., 64, 65, 66, 67, 68, 71 ff., 82, 83 ff., 86, 95 n., 99, 103, 107 ff., 118, 119, 121 n., 130, 133, 141, 145 f., 173, 184, 206 n., 209, 225 n.
- Jellinek, W., 59 n., 212 n., 232 n., 245.
- Judiciary, 34, 37.

Jurists of German Empire, Chap. II.  
 Jurists, philosophical, Chap. V, and pp. 209 ff., 235.  
 Justi, 4.

Kahl, 242 n., 249 n.

Kaiser (*see also* Executive, King, Monarch, Sovereign), 75, 76 n., 106, 113, 123, 202, 210, 211, 212, 215 n., 237.

Kaliski, J., 223.

Kant, I., viii, 2, 4 ff., 11, 12, 13 n., 24, 47, 129, 155, 156, 161, 165 n., 166, 170 n., 192 n., 207.

Kantorowicz, H. U., 157 n.

Kaufmann, E., 162 n., 165 n., 167, 169 n., 175 n., 189 ff., 198 n., 207.

Kautsky, K., 217 n.

Keil, 140 n.

Kelsen, H., 24 n., 143 n., 156, 166, 167, 168 ff., 186, 200, 202, 206 n., 214, 234 n., 255, 257.

Kessler, Count, 228.

King (*see also* Executive, Kaiser, Monarch, Sovereign), 3, 70; -Kaiser, 124; -State, 77.

*Kleinfürstenherrlichkeit*, 124.

*Kleinstaatserei*, 124.

Klöppel, 76 n.

Koch, 215 n., 243 n.

Koenen, 227 n., 229 n.

Kohler, J., viii, 156 f., 158, 185, 192 f., 207.

• *Kompetenz-Kompetenz*, 58, 60, 61, 62, 64, 66, 92 n., 99, 101, 103, 108, 111, 112, 116, 117 f., 119, 120 n., 121, 143, 173, 232 n., 244, 245 f., 248, 251, 269.

Krabbe, H., 53 n., 154 n., 167, 267.

Krause, 40, 155.

Krieck, E., 2 n., 9 n., 10 n., 15 n.

*Kultur*, 199.

*Kulturkampf*, 260.

• *Kulturnormen*, 200 n.

*Kulturplan*, 192.

*Kulturstaat*, 194.

Laband, P., 33, 47, 49 n., 50 n., 54, 56 ff., 62, 64, 65, 68 ff., 71, 80 ff., 95 n., 96, 103 ff., 108, 111, 112, 117,

119, 122, 125, 128 n., 129, 130, 143, 173, 209, 245, 249.

Laferrière, E., 33 n.

*Land*, 239 n.

*Länder*, 240, 241, 242, 244 ff., 249, 253.

*Landesgewalt*, 98.

Landsberg, 42 n., 49 n., 52 n., 56 n.

Lask, E., 161 n.

Laski, H. J., 151.

Lassalle, 40 n.

Lasson, A., 186 ff., 193, 207.

Law, administrative, 33 ff., 77 ff.; of culture, 196, 197; essence of State, 35; of ideational shifts, 29; natural, 4 ff., 11 f., 18, 31 n., 47, 156, 158 f., 160, 165 n., 168, 179, 196, 207, 209, 211, 212, 263; of necessity, 197; philosophy of, Chap. V and p. 209; positive, 160, 165, 168, 187; private, 74, 90, 131, 144; public, 71, 73, 74, 90 f., 131, 133, 138, 144, 145, 210, 231, 241, 244, 247, 250 n., 253; pure theory of, 167 ff., 186; right, 193; Roman, 247; and State, 140, 145, 165, 170, 174, 181, 187, 199; statute, 204, 205, 206; supremacy of, 88.

League of Nations, 271.

Legislation, moments in process of, 69.

Legislator, function of, 71.

Leviathan, 60 n., 226, 235.

Lévy-Bruhl, L., 3.

Liberalism, 28, 224, 236.

Liberals of 1848, 216 n.

Liberation, War of, 16, 21.

Lincoln, A., 108 n.

Locke, 27.

Loening, E., 86 f.

Lord, feudal rights of, 33.

Louis XIV, 3, 128, 130, 268.

Lukas, J., 150 n., 234, 247, 248.

Luther, 211 n.

Luxemburg, 236.

MacBain, 232 n., 239 n.

*Macht*, 190 n., 191 n.

*Machtpolitik*, 47.

Madison, J., 271 n.

Maitland, viii, 130 n., 141 n., 151 n.

- Marcks, E., 4.  
 Marx, K., viii, x, 15, 40 n., 44, 45, 46 n., 216 n.  
 Marxism, 216 n.  
 Maurenbrecher, R. M., 32, 52, 53 n., 54, 74.  
 Mattern, J., 167 n.  
 Mayer, M. E., 200 n.  
 Mayer, O., 33, 70, 76, 87 ff., 122, 125.  
 Max of Baden, Prince, 212, 219.  
 McIlwain, C. H., 255 n., 259 n.  
 Meier, E., 42 n.  
 Meinecke, F., 4, 9 n., 15 n., 20 n., 25 n., 28 n., 75, 210 n.  
 Meisner, H. O., 20 n., 21 n., 24 n., 27 n., 76 n.  
 Meissner, O., 216 n., 235, 247, 248.  
 Member-State, *see* State.  
 Merkel, A., 200 n.  
 Merriam, C. E., 26 n.  
 Metajurisprudence, 60, 156, 166 f., 169, 174, 176, 186, 200, 202.  
 Metaphysics, 44, 151, 258.  
 Method, historical, 12.  
 Metternich, 20, 21, 22, 25.  
 Meyer, G., 33 n., 71 n., 101 f., 106, 117 f.  
 Mill, 10.  
 Miller of San Souci, 3.  
 Mohl, von, R., 25 n., 35 n., 39, 42, 43, 96.  
 Monarch (*see also* Executive, Kaiser, King, Sovereign), 30, 31, 42, 52, 54, 55, 69, 75, 107, 169, 213, 241, 254, 257, 258.  
 Monarchical principle, 24 n., 25 ff., 54 f., 73 ff., 210 f., 212, 213, 214 n., 215, 216.  
 Monarchy (*see also* Federalism and monarchy), 215, 235; absolute, 137, 148, 169, 175, 201, 213, 257; constitutional, 4, 14, 16, 25 ff., 30 f., 69, 70, 92, 127, 130, 175, 188, 213; vs. democracy, 216; hereditary, 32, 127; and sovereignty, 73 ff.  
*Monstrum*, 93.  
 Montesquieu, 5, 18, 27.  
 Müller, Adam, 25 n.  
 Müller, August, 224 n., 227 n.  
 Müller, R., 221, 227 n.  
 Müller, W., 22 n.  
 Napoleon, 10, 16.  
 Napoleonic Wars, 2, 16, 32.  
 Nationalism, German, 9, 10.  
 Nation-State, 274.  
 Naumann, F., 215 n., 229, 230.  
 Nawaisky, H., 250 f.  
 Neo-Hegelianism, 156, 193.  
 Neo-Hegelians, 186 ff., 207, 208.  
 Neo-Kantianism, 156, 157, 159 ff., 186, 189.  
 Neo-Kantians, 157, 186, 192, 193, 200, 207, 208, 214 n., 255.  
 Nelson, L., 179 ff.  
 Neuberger, E., 249 n.  
 Nicholas I of Russia, 21.  
 Nietzsche, 13 n., 192 n.  
 Normative principle, 255, 256, 260, 261.  
 Norms, 158, 168, 170, 172, 176, 177, 178, 180, 187, 200, 201 f., 203, 204, 205, 206, 207, 255, 256, 257.  
 North German Confederation, 204.  
*Obrigkeitsstaat*, 26.  
*Obrigkeitsstaat*, 210, 235, 243 n.  
*Obrigkeitssystem*, 210.  
 Omnicompetence, 92, 110, 112, 173, 259.  
 Omnipotence, 92, 174, 207, 226, 247, 257, 259.  
 Oncken, H., 216.  
 Oppeln-Bronikowski, von, F., 223 n.  
 Oppenheimer, H., 232 n., 234 n., 239 n., 252 n.  
 Particularism, 101, 124, 237, 273.  
 Peace, 7, 8, 15, 191, 207.  
*Persona ficta*, 131.  
 Philosophic movement, Chap. V and pp. 55, 209.  
 Philosophy of State, *see* State.  
 Pluralism, 39 ff., 136 ff., 254, 263, 266, 270, 271, 273.  
 Poetzsch, F., 247.  
 Politics, science of, 40.  
*Politik*, 48.  
*Polizeistaat*, 34, 35, 36.  
 Positivism, 155 ff., 193, 204.  
 Pound, R., 72 n., 157 n., 165 n., 192.  
 Power, highest, 187, 201 ff., 204, 236, 249, 257, 258, 260, 262, 263, 267, 270, 271, 272, 274.

- Prailauncé, de, H. N., 252 n.  
 Preuss, H., 49 n., 53 n., 57, 58, 75 n., 97 n., 101, 102 n., 104, 124, 130, 131 n., 133 f., 138, 139 n., 142 ff., 150, 152 f., 154 n., 167, 209, 216, 226 n., 230, 234, 235, 236 ff., 243.  
 Proletariat, 45, 217, 219, 220, 222, 226, 229 n.  
 Proudhon, 43.  
 Prussia, 2, 4, 10, 16, 17, 28, 36 n., 38, 75, 78, 101, 121, 122, 124, 125, 187, 204, 212, 230, 237, 238, 245, 246, 247; Constitution of, 16.  
 Pufendorf, viii, 92, 97 n.  
 Radbruch, G., 155 n., 157 n., 165 n., 179.  
 Radicals, 219, 220.  
*Rätestaat*, 230.  
*Räte-system*, 217 ff.  
 Rathenau, W., 211 n., 224.  
 Rationalism, 11, 28 f.  
 Rauschenberger, W., 249 n.  
 Realism, 47.  
*Realpolitik*, 47.  
*Rechtssouveränität*, 167.  
*Rechtsstaat*, 35 ff., 41, 60, 61, 72, 77 ff., 80, 88, 89, 139, 140, 144, 146, 171, 175, 187, 194, 195, 229, 230, 267.  
 Redslob, R., 233.  
 Reeve, H., 94 n.  
 Referendum, 232, 240, 269.  
 Reformation, 40.  
 Rehm, 117 n.  
 • Reich, viii, 50, 76, 77, 78, 81, 82, 91, 93, 98 ff., 103, 105 ff., 113, 116, 117, 118 f., 122 ff., 126, 147, 149, 206, 210, 231, 232 f., 235, 237, 239 ff., 253, 260.  
 Reichsrat, 239, 248.  
 Reichstag, 106, 226, 231, 232, 234, 235, 239, 242, 269.  
 Renaissance, 34.  
 • Republic, German, Chap. VI.  
 Restoration, 5, 11, 25, 32, 48.  
 Revival, Romantic, 10.  
 Revolution of 1918, 1, 91, 124, 209, 211 ff.  
 Rexius, G., 29 n.  
 Rickert, H., 162 n.  
 Right to existence, 197.  
 "Right law," 157 n., 158, 161, 207.  
 Right of might, 91.  
 Rights, protection of individual, 89 ff.; public, 88 f.  
 Rogers, 232 n., 239 n.  
 Romanticism, 47.  
 Rome, 260.  
 Rönne-Zorn, 76 n.  
 Rosenberg, W., 122.  
 Rosin, H., 63 ff., 83 n., 104, 109 n., 118 ff., 122, 130, 206 n.  
 Rousseau, 5, 6.  
 Russia, 222, 231 n.; Constitution vs. *Rechtsstaat*, 230; influence of, 219 f., 231 n.  
 Saint-Simon, 43.  
 Sanction, 55, 68 ff., 77, 106, 113, 128, 200 n.  
 Sander, F., 166, 167 ff., 174 ff., 200.  
 Sauer, W., 165 n.  
 Savigny, von, F. C., 28, 47, 153.  
 Saxony, 101, 247.  
 Scheidemann, 212.  
 Schelling, 24, 28, 29, 39.  
 Schiller, 224 n.  
 Schmidt, B., 55.  
 Schmidt, H., 28 n.  
 Schmidt, R., 214 n.  
 Schmitt, C., 167 n., 175 n.  
 Seeley, J. R., 17 n.  
*Selbstbindung*, 202.  
*Selbstverpflichtbarkeit*, 63, 66, 110.  
*Selbstverpflichtung*, 64, 73.  
 Senate, 96.  
 Seydel, von, M., 57, 73 ff., 93, 96 ff., 107, 113, 115, 123, 130, 142, 147, 239 n., 245, 249, 269.  
 Sinzheimer, H., 229 n.  
 Social Contract, 6, 7, 12, 179.  
 Social Democracy vs. Bolshevism, 216 f.  
 Social Democrats, 216 n., 219 ff., 228, 229 n.  
 Social evolution, 216.  
 Socialism, 8, 15, 216, 229 n., 230.  
 Sociology, viii, 11, 15, 40, 48, 168, 187 n., 208, 214, 257 ff.  
 Somló, F., 199 n., 200 ff., 206 n.  
 Somlo, Stier, F., *see* Stier-Somlo.  
 Sovereign (*see also* Executive,

- Kaiser, King, Monarch), 7, 254, 255, 262, 264, 267, 269.
- Sovereignty (*see also* Monarchy), *passim*; absolute, 113, 142 ff., 257 ff.; and administration, 33 ff., 77 ff.; and anarchy, 218, 262 ff., 272; Bodinian, 92; and constitutional principle, 23 f.; divided, 93 ff., 117, 121, 123, 214 n., 252; expressed in legislation, 70; indivisibility, 58, 96 ff., 113, 262; monarchical, 212; popular, 5, 22, 76, 104, 106 n., 125, 181 f., 212, 218, 225, 227, 232, 233, 235, 243 f.; principle of, in operation, 266 ff.; political vs. juristic, 259; unity of, 113.
- Soviets, *see Räte-system*.
- Spann, O., 225 n.
- Spartakists, 221, 227.
- Spencer, 10.
- Spengler, O., 46 n.
- Staat, 239 n.
- Staatenbund, 94 ff., 104, 112, 115, 185.
- Staatenreich, 95.
- Staatenstaat, 95 n.
- Staatsgewalt, 53 ff., 58, 62, 76, 78 f., 88, 215 n., 232 n., 243 ff.
- Staatslehre, ix, 48.
- Staatswissenschaften, viii.
- Stahl, F. J., viii, 25 ff., 35 n., 40, 47, 55 n., 77, 92 n., 155.
- Stammler, R., viii, 157 n., 158, 160 ff., 167, 177, 186, 198 n.
- State, *passim*; absolute, 144; central, Chap. III, and pp. 146, 173, 195, 250, 251, 269; constitutional, 234, 257; defined by its purpose, 118 ff.; federal, Chap. III, and pp. 66, 146, 214, 238, 241, 247, 248 n., 250, 251, 266, 267, 269, 270, 274; as an individuality, 12; as juristic construction, 171, 175 f., 202; as legislator, 141; as *Macht*, 15; member-State, Chap. III, and pp. 146, 147, 150, 173, 195, 241, 243, 247, 248, 250, 251, 268, 269; non-sovereign, 100 ff., 118, 119, 173, 198, 205 f., 245, 246, 251; as an organism, 13, 29, 139, 175; as person, 12, 29 f., 32, 44, 51 ff., 78, 79, 82, 127, 144, 170 f., 175, 205, 206, 235; philosophy of, new, 11 ff.; prince as organ of, 127; responsibility of, 85 ff., 91; science of, 40; separation of powers of, 79; severing of, and society, 15; and society, 39 ff., 48, 128; and sovereignty, Chap. VII, and pp. x, 23 f., 30, 32, 61 f.; sovereign territorial, 34; subject of all public power, 88; transition of, 33; unitary, Chap. III, and pp. 173, 238, 241, 242, 245, 246, 247, 248, 249, 251, 267; World, 179, 184, 188, 190 f., 196, 273.
- Statehood, 97, 101, 102, 107, 238, 240, 242 n., 244, 246, 247, 248, 249.
- State-Person, 145, 148.
- States' rights, 97, 239 n.
- Stein, vom, Freiherr, 10, 16 ff., 20, 223.
- Stein, von, I., viii, 39, 40, 43, 44, 45, 48, 86 n.
- Stier-Somlo, F., 157 n., 215 n., 232 n., 244 n., 247.
- Stintzing, 42 n., 49 n., 52 n., 56 n.
- Stoerk, P., 56 n.
- Strauch, W., 169.
- Stuarts, 260.
- Sturm und Drang, 4.
- Switzerland, 98, 105, 125.
- Sybel, von, H., 20, 21 n.
- Tatarin-Tarnheyden, E., 225 n., 228 n.
- Theocracy, 28.
- Theology, 174 f., 257, 258.
- Thibaut, 28 n.
- Thon, A., 200 n.
- Tocqueville, de, 93, 94, 214, 249, 268.
- Treitschke, von, H., vii, ix f., 15, 17 n., 96, 122, 123 f.
- Ultra vires*, 85, 90, 135.
- United States, 98, 105, 125, 147, 218, 233, 267, 270 n., 271; Constitution of, 96, 97, 245.
- Utopia, 255, 256.
- Vaihinger, H., 29.
- Vassal, *wohlerworbene Rechte* of, 33.
- Vaughan, C. E., 5 n., 7, 9 n., 12 n.
- Veblen, T., 91 n.

- Venator, H., 248 n.  
*Verwaltungsrechtspflege*, 89 f.  
 Vienna, Congress of, 19; Final Act of, 21.  
 Voeglin, E., 167 n., 170 n.  
 Vogel, 216 n.  
 Vogel, P., 40 n., 44 n.  
*Volkstaat*, 210 n., 235, 243, 244.  
 Waitz, G., 93, 94 ff., 99, 101, 104 n., 107, 115, 122 f., 214, 249, 252, 268.  
 War (*see also* World War), 15, 189, 191, 192, 197, 198, 207, 258, 265.  
 Ward, Sir A. W., 10 n.  
 Warnkönig, L. A., 31.  
 Weher, A., 9 n.  
 Weber, M., 163 n., 227 n.  
 Weltsch, F., 225 n.  
 Wenzel, M., 200, 204 ff., 238 n., 249 n.  
 William II, 210, 212.  
 Willoughby, W. W., 51 n., 108 n.  
 Wittmayer, L., 241 n.  
 Wolzendorff, K., 2 n., 49 n., 152 n.  
 World War, 188, 189, 210, 214 n., 219, 226, 231 n., 235, 236, 267.  
 Young, G., 239 n.  
 Zöpfl, H., 19 n., 32, 54.  
 Zorn, P., 49 n., 50 n., 70, 97 n., 100, 112 f., 143 n.  
 Zorn, Rönne, *see* Rönne-Zorn.  
*Zwingherr*, 9.